Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., AND KEVIN F. HOBBS,

Petitioners,

v.

ESQ BUSINESS SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If the interstate commerce activities of a client require it to seek non-litigation legal services, may a state in which these activities occur prevent this non-resident client from using its counsel of choice?

2. Whether a state can prevent a client from retaining an out-of-state attorney in the arbitration of a contractual dispute that involves interstate commerce and is subject to the Federal Arbitration Act?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Birbrower, Montalbano, Condon & Frank, P.C., and Kevin F. Hobbs respectfully pray that a writ of certiorari issue to review the judgment of the California Supreme Court in this case.

OPINIONS BELOW

The opinion of the California Supreme Court that gives rise to this petition is reported at 17 Cal.4th 119 [70 Cal.Rptr.2d 304; 949 P.2d 1; 1998 Cal. LEXIS 2] (1998) and is reproduced in the Appendix at App. 1. The order modifying the opinion, but not changing the judgment, is reported at 90 Cal.Daily Op. Service 1376 [98 D.A.R. 1871] (1998). App. 43. The opinion of the Sixth Appellate District of the California Court of Appeal is reported at 49 Cal.App.4th 801 [56 Cal.Rptr.2d 857; 1996 Cal.App. LEXIS 908] (1996). App. 45. The order of the Santa Clara County Superior Court is unreported. App. 60.

JURISDICTION

The California Supreme Court entered judgment on January 5, 1998. On March 5, 1998, Justice O'Connor granted petitioner's application for an extension of time to file a petition for a writ of certiorari and extended the time to and including May 5, 1998. App. 44. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Business & Professions Code section 6125 provides:

> No one shall practice law in California unless the person is an active member of the State Bar.

California Business & Professions Code section 6126(a) provides:

> Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, is guilty of a misdemeanor.

Article I, section 8, clause 3 of the Constitution of the United States grants Congress the authority:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Birbrower, Montalbano, Condon & Frank, P.C. is a New York law corporation located in New City, New York. Petitioner Kevin F. Hobbs is a lawyer employed by the Birbrower firm (collectively the "Firm").

In 1986 the Firm began representing the Sandhu family in various business matters. Kamal Sandhu was the sole shareholder of ESQ Business Services Inc., a New York Corporation ("ESQ-NY"), of which his brother Iqbal

Sandhu was the vice-president. In 1990, Kamal Sandhu and Diane Sandhu (Iqbal Sandhu's wife) contacted Hobbs to request his assistance in reviewing a proposed Software Development & Marketing Agreement (the "Agreement") with Tandem Computers. The Agreement granted Tandem worldwide distribution rights to computer software created by ESQ-NY. After Hobbs reviewed the already-drafted Agreement and proposed revisions, ESQ-NY and Tandem signed the Agreement.

Thereafter, a second corporation, also named ESQ Business Services, Inc. ("ESQ-CA"), was incorporated in California. ESQ-CA is owned and operated by Iqbal Sandhu and Diane Sandhu. In 1991, Iqbal Sandhu consulted the Firm concerning Tandem's performance under the Agreement, which called for binding arbitration in California under the American Arbitration Association Commercial Arbitration Rules. Hobbs advised the Sandhus regarding the parties' respective rights and obligations under the Agreement.

In 1992, at ESQ's request, the Firm agreed to represent ESQ-NY and ESQ-CA.[1] Both entities signed a fee agreement with the Firm setting forth the details of this representation. The Firm was authorized to investigate and prosecute claims against Tandem for copyright infringement, antitrust violations, and breach of contract. The fee agreement was executed in New York but was later modified to a fixed fee agreement in California. Because the ESQ-Tandem Agreement was entered into

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[1] The dissent emphasized that the firm represented both ESQ-NY and ESQ-CA. App. 32.

between ESQ-NY and Tandem, the claims against Tandem were actually "owned" by the New York corporation. Accordingly, the fee agreement specifically authorized Iqbal Sandhu to take all action required to prosecute and resolve the claims and causes of action against Tandem on behalf of ESQ-NY.

Over the next year, the Firm spent over 1,000 hours working on the case in the Firm's New York office. The Firm investigated ESQ's potential claims against Tandem, researched a myriad of legal issues, interviewed witnesses, analyzed thousands of documents, and engaged in negotiations with Tandem in an attempt to resolve the dispute. In February 1993, at the direction of ESQ, the Firm filed for arbitration against Tandem with the American Arbitration Association in San Francisco.

Between August 1992 and April 1993, Hobbs and two other Firm attorneys made two brief trips to California to discuss strategy with ESQ, meet with ESQ's accountants, negotiate with Tandem representatives, and interview potential arbitrators. On August 30, 1993, Hobbs traveled a third time to California at ESQ's request to assist in settlement negotiations with Tandem. The next day, ESQ and Tandem entered into a settlement agreement that resolved the dispute. The matter was never arbitrated.

B. Trial Court Proceedings

In January 1994, ESQ-CA and Iqbal Sandhu filed a lawsuit against the Firm for legal malpractice and related claims. The Firm removed the matter to federal court and filed a counterclaim for breach of contract. ESQ-NY joined the lawsuit as a plaintiff and the matter was then

remanded to superior court. On November 16, 1995, ESQ filed a Motion for Summary Judgment and/or Adjudication. ESQ asserted that because the Firm traveled to California three times to consult with ESQ and to assist in the negotiations with Tandem, the Firm engaged in the unauthorized practice of law in California, in violation of Business and Professions Code section 6125. ESQ argued that, as a result, the fee agreement was unenforceable.

The Firm's Opposition to the Motion for Summary Judgment explained that the Agreement involved the worldwide marketing of software and cited authority holding that, in cases involving interstate transactions, an attorney may recover fees even though some of the services rendered by him were in a state where he was not admitted to practice.

In addition, the Firm cited authority permitting an out-of-state attorney to recover his fees for services rendered before a federal court in California. The Firm argued that just as the state cannot regulate the practice of law before federal courts, it cannot regulate the representation of parties in disputes before the American Arbitration Association ("AAA"). The Firm also argued that because the AAA Commercial Arbitration Rules do not require a party to be represented by an attorney, it did not engage in the unauthorized practice of law.

C. Sixth District Court of Appeal

The Santa Clara County Superior Court granted ESQ's Motion for Summary Adjudication. The Firm filed a Petition for Writ of Mandate and/or Prohibition with the Sixth Appellate District of the California Court of

Appeal. The court of appeal denied the Firm's Petition for Writ of Mandamus, ruling that (1) because the Firm is not licensed in California, it engaged in the unauthorized practice of law in violation of Business and Professions Code section 6125, and (2) the fee agreement was unenforceable regardless of where the work was performed. App. 53, 58. The court of appeal held that the supremacy clause issues present in the regulation of practice before federal courts do not apply to a AAA forum. App. 54. In addition, the court of appeal rejected the Firm's "interstate representation" argument. App. 57.

D. California Supreme Court

The California Supreme Court granted review. Prior to oral argument, several parties filed amicus curiae briefs with the court. The State Bar of California argued that no exceptions to Business & Professions Code section 6125 applied to the Firm's conduct. In reply to the State Bar's brief, the Firm argued that, in non-litigation matters involving issues of interstate commerce, a client should be free to retain an out-of-state lawyer. During oral argument, the parties discussed at length the impact of the court of appeal's ruling on interstate commerce.

In addition, the Firm argued in its reply to the State Bar that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) ("FAA") preempted Business & Professions Code section 6125. The Firm asserted that the FAA governed the arbitration as the dispute pertained to interstate commerce, and that federal law does not require a locally licensed attorney to arbitrate the case. Therefore, the Firm argued the state could not interfere with a client's right to hire

his or her counsel of choice for an arbitration governed by the FAA.

On January 5, 1998, the California Supreme Court held that, to the extent the Firm performed legal services in California, it engaged in the unauthorized practice of law. App. 2. The court reversed the court of appeal in part by holding that on remand the Firm may be entitled to recover fees for services it performed in New York. App. 3, 28-29.

In the majority opinion, the California Supreme Court conceded that the California Bar does not regulate practice before the United States courts located in California. App. 13. The court, however, rejected the Firm's argument that the FAA preempted California law and prohibited the application of section 6125. App. 20. In addition, the court distinguished a federal case that held an out-of-state attorney can recover fees for services rendered in an arbitration proceeding. App. 18. The dissent argued that the majority's attempt to distinguish this authority was "unpersuasive." App. 42.

On February 25, 1998, after receiving numerous third party correspondence urging the Court to clarify or expand the exceptions to Business and Professions Code section 6125 (*see* letter from California Dispute Resolution Council, reproduced at App. 69-71.), the California Supreme Court modified its opinion by specifying that the statute does not apply to certain labor arbitrations. The court added the following language after the first sentence and citation at App. 14:

> "Likewise the [State Bar] Act does not apply to the preparation of or participation in labor

> negotiations and arbitrations arising under collective bargaining agreements in industries subject to federal law. (See, e.g., *Teamsters Local v. Lucas Flour Co.* (1962) 369 U.S. 95, 103; see also Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a)."

Modification also reprinted at App. 43.

The court did not respond to the Firm's and other third party requests for further briefing and a rehearing. *See* letter from Marshall L. Small, General Counsel, Morrison & Foerster LLP (March 3, 1988) at App. 64-68; letter from Nancy K. Undem (February 27, 1988) at App. 72-74.

REASONS FOR GRANTING THE WRIT

This petition questions the constitutionality of certain applications of the California unauthorized practice of law ("UPL") statute. These statutes, which in one form or another exist in all 50 states, prohibit and in some instances criminalize the unauthorized practice of law. In this matter, the California Supreme Court held that a lawyer violated the California UPL statute by representing a business involved in an interstate commerce transaction and dispute. Conflicting with (1) other states' interpretations of similar statutes, and (2) the published opinion of the Chief Reporter for the American Law Institute's Restatement of the Law Governing Lawyers, the California Supreme Court's opinion unconstitutionally burdens interstate commerce by requiring businesses to retain separate counsel in each state in which they operate.

This opinion requires businesses with multi-state concerns to retain and pay for additional legal advice which, in most instances their primary outside or general counsel (collectively "general counsel") can competently provide. For companies involved in interstate business, this opinion will add an unnecessary layer of bureaucratic structure, increasing costs and decreasing the company's efficiency and ability to compete for legitimate business.

Incredibly, a fair reading of the California Supreme Court's opinion provides under circumstances where an out-of-state company requires legal counsel regarding an interstate commerce matter impacting California, any assistance its general counsel might provide from out of state, even to local retained counsel, may violate California law. In a footnote, the court states:

> Contrary to the trial court's implied assumption, no statutory exception to section 6125 allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar.

App. 6 at note 3.

Moreover, this opinion effectively precludes a company from exercising its right to retain its counsel of choice. Indeed, under this opinion, general counsel faces potential misdemeanor charges for representing a client in an interstate business transaction or dispute where the activity touches a state in which this lawyer is not licensed.

Compounding the complicated issue of multi-jurisdictional law practice, state court opinions conflict with

one another regarding the circumstances under which a lawyer from out of state may provide legal advice impacting a business in a state in which the lawyer is not licensed. Some opinions, including the one giving rise to this petition, conflict with the American Bar Association's Model Code of Professional Responsibility that encourages the breakdown of artificial barriers to promote the efficiency of interstate business. Interestingly, because of these conflicts, a company seeking to do business in two states in addition to its home state may find one state (like Michigan), willing to allow the out-of-state general counsel to negotiate transactions there, while the other (like California), imposing criminal penalties for providing comparable representation.

Limitations on a company's choice of lawyer in non-public forum arbitration practice concerning interstate matters also impermissibly burden commerce. A company should be free to choose its own general counsel to represent it in such a forum. Yet, contrary to the position of several other states, the opinion at issue prevents the company from doing so.

Surprisingly, in a dispute concerning interstate commerce, some courts have made it impossible for an out-of-state lawyer to participate in alternative dispute resolution procedures occurring in their states, even though they would allow that same lawyer to appear in their courts were the dispute venued there. Indeed, absent unusual circumstances, a federal or state court would undoubtedly grant permission for out-of-state counsel to appear in a formal proceeding. However, in an arbitration context there is no recognized *pro hac vice* admission procedure, and incredibly, the California Supreme Court

blatantly implies even the association of local counsel in an arbitration will not insulate the out-of-state attorney from the effect of the UPL statute.

Some courts, apparently striving to avoid finding the out-of-state attorney violated the state's UPL statute, hold arbitration practice does not fall within the definition of "practice of law" at all. Unpersuasively, the California Supreme Court distinguished these opinions by suggesting preparing for an arbitration constitutes the practice of law, while the actual arbitration activity itself may not be. App. 18.

This Court should grant this petition and issue a ruling that allows businesses engaged in interstate commerce to use their general counsel in multi-state transactions and arbitrations free from state interference. Indeed, the increasing demand for legal counsel in matters involving interstate business will continue to create more conflicts with state UPL statutes across the nation. These conflicts demonstrate the need for this Court to establish a uniform standard for multi-state representation.

I. The California Supreme Court's Decision Discriminates Against And Unduly Burdens Interstate Commerce By Preventing Businesses From Retaining Their Counsel of Choice

Consider the following hypothetical: Assume a New York company has been in the telecommunications business for ten years. The company has an established relationship with one law firm, whose lawyers are members of the New York bar only. The New York company

decides to license certain intellectual property to a California company, and calls on its New York counsel to represent it in the transaction. New York counsel is already substantially familiar with the New York company's business, and has participated in drafting all of its transactional documents, including a similar licensing agreement with a Michigan company. Should the New York company be precluded from using its New York law firm to negotiate and draft the documents because the contemplated license will be with an out-of-state company?

Clients have a strong interest in being able to retain the counsel of their choice. This choice can be profoundly personal. This decision is based on a variety of factors including: proficiency, efficiency, cost, recommendation, trust and gut-feeling. Commentators recognize that:

> [a] client's preference for counsel can be especially strong when an out-of-state lawyer has been representing the client in other matters and they have developed a strong working relationship.

Carol Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 Kan. L. Rev. 453, 476 (1997).

Not surprisingly, "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment."[2] *Wheat v. United States*, 486 U.S.

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[2] There are also First Amendment considerations that support the right to counsel of choice. This Court's decisions in *NAACP v. Button*, 371 U.S. 415 (1963) and *United Mine Workers v.*

153, 159 (1988). A company's right to select its counsel in an interstate commerce transaction is analogous to the defendant's right in the Sixth Amendment context. This is particularly so where the anticipated transaction may be a "make or break" one for the company.

In the civil context, some courts specifically recognize the right of clients to choose an out-of-state lawyer to represent them in matters involving interstate commerce. The Supreme Court of New Jersey acknowledged that:

> [w]hile the members of the general public are entitled to full protection against unlawful practitioners, their freedom of choice in the selection of their own counsel is to be highly regarded and not burdened by "technical restrictions which have no reasonable justification."

Estate of Waring, 47 N.J. 367, 375 [221 A.2d 193, 197] (1966) (citations omitted).

Under California law (and the law of other states), New York counsel in the hypothetical would be precluded from representing the New York client in negotiating and drafting the intellectual property license where the licensee is a California company. Said differently, California discriminates against interstate commerce by interfering with the New York company's choice of counsel. Indeed, the New York law firm would likely refuse to

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Illinois Bar Association, 389 U.S. 217 (1967) implicitly support the right to counsel of choice.

accept the assignment as it could lead to a criminal prosecution for the unauthorized practice of law under California Business and Professions Code section 6126(a). As a result, the New York company will incur additional costs and expenditures of time in a search for new California counsel. California counsel would then have to ascend the learning curve the New York counsel had previously climbed. And, of course there is no guarantee any California counsel could establish the comfort or competency level previously existing and achieved between and by the New York counsel and the client.

Although the California Supreme Court acknowledges the need to "accommodate the multistate nature of law practice" (App. 21), the effect of the ruling indicates otherwise. As the hypothetical demonstrates, by applying UPL statutes to effectively preclude out-of-state companies from using their general counsel to represent their interests in interstate business, states impose unnecessary and impermissible restrictions on interstate commerce.

The Commerce Clause "directly limits the power of states to discriminate against interstate commerce." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* at 273-74.

In general, there are two types of impermissible regulations. First, state statutes that clearly discriminate against interstate commerce, either on their face or in practical effect, are routinely struck down unless the discrimination is demonstrably justified by a legitimate state

interest unrelated to economic protectionism. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986). Second, even if a statute is found to be facially neutral and nondiscriminatory, it still may be invalid if the burden on interstate commerce clearly outweighs the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). There is, however, no clear division separating these categories. "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986).

The California State Bar generally asserts the purpose of requiring State Bar membership is to protect its citizens from unqualified or unethical lawyers. This rationale, however, carries little or no weight when applied to businesses conducting interstate commerce. As sophisticated legal consumers, corporations are in little danger of hiring incompetent counsel. *See* Daniel A. Vigil, *Regulating In-House Counsel: A Catholicon or a Nostrum*, 77 Marq. L. Rev. 307, 320 (1996). The California Supreme Court's decision impinges the right of clients to retain their counsel of choice.

While California has an interest in regulating out-of-state lawyers that appear before its courts or wish to permanently set up shop in California, it has little interest in prohibiting an out-of-state lawyer from visiting California merely to assist a multi-state client negotiate a contract, or resolve a dispute involving interstate commerce. Applying California's UPL statute in these situations simply does not further the state's interest in protecting clients from unskilled or unethical lawyers.

The effect of the California Supreme Court's ruling is comparable to the local-processing requirements that this Court has consistently invalidated. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), this Court invalidated an Arizona statute requiring that all Arizona cantaloupes be packed in Arizona. This requirement was purportedly enacted to enhance the reputation of and demand for Arizona's high quality cantaloupes. This Court held that while the state had a legitimate (though tenuous) interest, it was clearly outweighed by the national interest in unencumbered commerce.

> [T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home state that could be more efficiently performed elsewhere. Even where the State is pursuing a clearly legitimate state interest, this particular burden on commerce has been declared to be virtually per se illegal.

Pike, 397 U.S. at 145. In *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994), this Court held that a local or state government could not even require its own garbage be processed locally as it deprived out-of-state firms the opportunity to do the processing.

In the matter at hand, the California Supreme Court's application of Business & Professions Code section 6125 similarly requires that contracts involving interstate commerce be "processed" by California lawyers. Requiring California lawyers to negotiate all contracts and resolve any dispute that involves California parties or California law places out-of-state companies at a distinct disadvantage when doing business in the state.

This petition therefore asks the Court to review whether the California statute and many like it impermissibly burden interstate commerce by requiring out-of-state companies to incur additional expense, time, and the loss of key negotiators or advocates when they do business with California companies and need the services of counsel.

II. This Petition Raises Issues Of National Importance That Are Ripe For Adjudication

In recent decades, the number of businesses conducting interstate and international commerce has grown substantially. In today's information based global economy, businesses in all sectors enter into contracts and sell goods and services nationwide. As a result, these businesses have demanded that their attorneys follow them across state and national borders.

Commentators note that a number of structural, educational, technological, and constitutional changes are responsible for the dramatic increase of multi-jurisdictional practice of law:

> Lawyers and clients are far more mobile than they were ten or twenty years ago. There is much greater uniformity in the law. . . . The Uniform Commercial Code governs a large number of commercial transactions. Correspondingly, differences in substantive law among the states are decreasing. Furthermore, federal law routinely extends into activities and realms traditionally thought of as the sole province of the states. Finally the law has grown so complex that lawyers can no longer master the minimum

> amount necessary to claim competence as generalists. . . . The complexity hinders clients' ability to employ local counsel and drives them to hire national experts whose offices may be far from the clients' actual place of business or headquarters.

Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice – Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. Tex. L. Rev. 717, 723-25 (1995). *See also* Samuel J. Brakel & Wallace D. Loh, *Regulating Multistate Practice of Law*, 50 Wash. L. Rev. 699, 699-700 (1975).

Moreover, innovations in telecommunications, online research, and transportation have enabled lawyers to serve clients' operations located across the country just as effectively as those located across the street. For interstate and international businesses, it is not only common, but often-times absolutely necessary, for their attorneys to conduct business in another state in which they are not licensed.

Despite the increasing volume of interstate commerce, many states are erecting barriers to the free flow of goods and services through the overbroad application of their UPL laws. All fifty states and the District of Columbia currently prohibit the unauthorized practice of law. Carole Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 Kan. L. Rev. 453, 458 (1997). In addition to prohibiting non-lawyers from practicing law, these regulations apply to lawyers licensed to practice law in other states. Thirty-seven states make unauthorized practice of law a misdemeanor, while others regard it as a contempt of court. Deborah L. Rhode, *Policing the Professional*

Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1, 45 (1981). These prohibitions are broad and largely undefined. Many jurisdictions simply proscribe, without defining, the practice of law. *Id.*

II. This Petition Should Be Granted To Resolve Conflicting Interpretations of State UPL Statutes As These Decisions Create Confusion and Uncertainty For Businesses Conducting Interstate Commerce

Conflicting state decisions in applying these UPL statutes create a deceptive trap for clients involved in interstate commerce and their lawyers. In contrast to the opinion at issue, a number of cases implicitly or explicitly acknowledge the propriety of multi-jurisdictional representation. *See Williamson v. John D. Quinn Const. Corp.*, 537 F.Supp. 613 (S.D.N.Y. 1982); *Appell v. Reiner*, 43 N.J. 313 [204 A.2d 146] (1964); *Spanos v. Skouras Theaters Corp.*, 364 F.2d 161 (2nd Cir. 1966) (en banc), *cert. denied*, 385 U.S. 987 (1969); *Cowen v. Calabrese*, 230 Cal.App.2d 870 [41 Cal. Rptr. 441] (1964); *Western Life Insurance Co. v. Nanney*, 296 F.Supp. 432 (E.D.Tenn. 1969).

For example, in *Appell v. Reiner*, 43 N.J. 313 [204 A.2d 146] (1964), the court observed that a New York attorney's professional representation of a client concerning interstate activity which touched New Jersey constituted the "practice of law," but went on to state:

> recognition must be given to the numerous multi-state transactions arising in modern times. . . . [I]nflexible observance of the generally controlling doctrine may well occasion a result detrimental to the public interest; and it

> follows that there may be instances justifying such exceptional treatment and warranting the ignoring of state lines.

Appell, 43 N.J. at 316. Further, in refusing to find that a New York law firm violated the New Jersey UPL statute by representing the estate of a New Jersey resident, the New Jersey high court said, "Multistate relationships are a common part of today's society and are to be dealt with in commonsense fashion." *Estate of Waring*, 47 N.J. 367, 375 [221 A.2d 193] (1966).

Moreover, perhaps the preeminent authority on these issues, Professor Charles Wolfram, author of *Modern Legal Ethics* and the Chief Reporter for the American Law Institute's Restatement of the Law Governing Lawyers, asserts that a court should not apply a state UPL statute to an out-of-state attorney so long as the attorney only infrequently gives legal advice in the state in which the attorney is not licensed and the legal matters involve significant interstate features. *See* Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. Tex. L. Rev. 666, 709-13 (1995).

Other courts agree. Instead of giving lip service to the multistate nature of law practice, Judge Friendly of the Second Circuit recognized it. He said,

> [i]n an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by "public act" of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective,

> subject only to valid rules of courts as to practice before them.

Spanos v. Skouras Theaters Corp., 364 F.2d 161, 170 (2nd Cir. 1966) (en banc), *cert. denied*, 385 U.S. 987 (1969).

The American Bar Association has long acknowledged that clients need their lawyers to be able to serve them across state lines. Model Code of Professional Responsibility, Ethical Consideration 3-9 states:

> Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal professions should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested manner in a tribunal before which the lawyer is not permanently admitted to practice.[3]

Indeed, Ethical Consideration 8-3 of the Model Code of Professional Responsibility encourages the dismantling of

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[3] *See also* ABA Comm. on Professional Ethics, Formal Op. 316 (1967).

artificial barriers to interstate commerce where multistate law practice is concerned:

> . . . Clients and lawyers should not be penalized by undue geographical restraints on representation of legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admissions procedures consistent with the needs of modern commerce.

Some states have accepted these above-stated rationales by promulgating regulations enhancing the ease of transacting interstate business within their borders. For example, the state of Michigan enacted a single sentence exception to its UPL statute. The exception reads as follows:

> This section does not apply to a person who is duly licensed and authorized to practice law in another state while temporarily in this state and engaged in a particular matter.

Mich. Stat. Ann. § 27A.916 (1997).

Compare the above-cited authority with the California Supreme Court's opinion at issue that acknowledges only five exceptions to California's UPL statute. Despite citing Ethical Consideration 3-9 of the Model Code of Professional Responsibility (App. 11), the California Supreme Court stated the only exceptions are: (1) an attorney making brief appearances before a state court or tribunal (App. 12); (2) an attorney appearing before a court as counsel pro hac vice (*id.*); (3) an attorney appearing in a United States tribunal (App. 13); (4) a foreign legal consultant who may advise on the law of the foreign jurisdiction (*id.*); and (5) an individual participating in an

arbitration or conciliation of international commercial disputes. *Id.*

The California Supreme Court recognized another exception in its modification published two months after its original opinion. This newly created exception provides that an attorney who participates in labor negotiations or arbitrations under collective bargaining agreements is not subject to the California UPL statute. App. 14, 43. This modification resulted from the outcry of attorneys practicing in this arena, who wrote to the Court to emphasize the profound impact this ruling would have on such interstate commerce issues. However, with now only six recognized exceptions that allow an out-of-state attorney to assist a client involved in interstate commerce activities, such businesses remain substantially handcuffed regarding these interstate matters which do not fall within these exceptions.

With this direct conflict between states, a company will be unsure whether it may use its general counsel in a matter affecting another state. If the matter is transactional in nature, perhaps this company will call on its general counsel who then might associate local counsel in the state in which the other contracting company resides. However, as previously mentioned, even this association does not insulate the out-of-state general counsel in California as the California Supreme Court declared that associating local counsel does not remove the lawyer from the reach of the UPL statue. App. 6 at note 3.

Practically speaking, even if associating local counsel in such circumstances insulated the out-of-state general counsel from prosecution in the jurisdiction where the

other contracting party resides, the costs and problems of such association might simply not be worth assuming. Professor Wolfram stated:

> it is preposterous to think that when one of the gurus of the mergers and acquisitions bar, Joseph Flom or Martin Lipton, emerges from an airplane in a jurisdiction far from New York City that they modestly submit themselves to the "supervision" of whatever locally-admitted lawyer their firms hypothetically might have engaged in an effort to comply with local restrictions on unauthorized practice. Nor is it evident why even mere journey-person lawyers should learn to heel to a local lawyer's obedience school supervision. A client whose tax lawyer traveled to another state to deal with a federal tax matter neither needs nor should be required to pay for another, largely useless lawyer simply to satisfy an empty legal requirement.

Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. Tex. L. Rev. 666, 677-78 (1995) (footnotes omitted). Requiring a client to retain local counsel for every out-of-state transaction does not materially advance the goal of protecting the client. Simply having another lawyer around the conference room does not guarantee the client additional protection, only additional expense.[4]

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[4] *See* Association of the Bar of the City of New York, Committee On Professional Responsibility Report, *The Engagement of Local Counsel And The Pro Hac Vice Admission Of Attorneys* (Feb. 1998) (advocating the elimination of the

Directing out-of-state general counsel to physically stay away from California does not resolve the problem either as the court held:

> [p]hysical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive.

App. 10.

Similar problems exist if general counsel is asked to represent his or her client in a private arbitration involving interstate commerce in a state in which he or she is not licensed. As indicated, in a court of law, pro hac vice procedures would allow the out-of-state practitioner to represent the company. However, as the Association of the Bar of the City of New York recognized, there is no procedure available or recognized which would or could provide pro hac vice status to the out-of-state general counsel wishing to represent his or her client in an arbitration:

> There are other reasons, too, why representation by an out-of-state attorney should be permitted. Such counsel tends to be the regular attorney for the union or for the company who knows the collective bargaining agreement and the facts of the case at hand. The arbitration does not usually require resort to local court procedure. The applicable law is not that of the forum courts but rather of the shop. Considerations that normally call for local legal representation are thus

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requirement that out-of-state attorneys associate local counsel for pro hac vice admission).

> absent. And, quite apart from this, even assuming that the attorney is prepared to seek admission *pro hac vice* in the forum state, how and from whom would he obtain such permission? Certainly, an arbitration tribunal is not authorized to give it to him; and to what courts could he or should he apply?

Association of the Bar of the City of New York Committee Report, *Labor Arbitration and the Unauthorized Practice of Law*, 30 The Record 422, 426-427 (1975).

Clients and their out-of-state general counsel might argue participating in an arbitration does not constitute the actual "practice of law" prohibited by the UPL statute. However, inconsistent state interpretations of what constitutes the "practice of law" exposes the out-of-state attorney to the risk of prosecution. While the California Supreme Court held that representing a client in arbitration constituted the unauthorized practice of law (App. 19), a federal court in New Jersey did not so hold. In *Williamson v. John D. Quinn Const. Corp.*, 537 F.Supp. 613 (S.D.N.Y. 1982), a New Jersey law firm brought an action seeking to recover payment for legal services rendered in an arbitration proceeding held in New York. The former clients asserted, in part, that because the New Jersey attorneys were not licensed to practice law in New York, they could not collect their fees. The court disagreed and held that the New Jersey firm was not precluded from recovering fees even though the attorney who performed the bulk of the services was not admitted to practice in New York. The court noted:

> Plaintiff's services were rendered solely in the arbitration proceeding. An arbitration tribunal

> is not a court of record; its rules of evidence and procedures differ from those of courts of record; its fact finding process is not equivalent to judicial fact finding; it has no provision for the admission pro hac vice of local or out-of-state attorneys. In *Spanos v. Skouras Theatres Corp.*, Judge Friendly held that an attorney not admitted to practice law in New York could recover fees for legal services even though he had not been admitted pro hac vice because "there is not the slightest reason to suppose that if (a motion had been made it) would have been denied." This observation applies with even greater force with respect to an arbitration proceeding which is of such an informal nature.

Williamson v. John D. Quinn Const. Corp., 537 F.Supp. 613, 616 (S.D.N.Y. 1982) (footnotes omitted). As indicated above, the California Supreme Court rejected this reasoning. This leaves attorneys who represent multi-state clients at risk for prosecution for the unauthorized practice of law in other states.

The California Supreme Court ignored the fact that parties resolving a dispute in a private arbitration need not be represented by an attorney at all. Under the American Arbitration Association Commercial Arbitration Rules, a non-attorney may represent a party at an arbitration. Paragraph 22 of the Commercial Arbitration Rules provides: "Any party may be represented by counsel or other authorized representative." Moreover, the Association of the Bar of the City of New York concluded that parties to international or interstate arbitration proceedings conducted in New York may be represented in such arbitration proceedings by persons of their own choosing,

including lawyers not admitted to practice in New York. Association of the Bar of the City of New York Committee Report, *Recommendation & Report on the Right of Non-New York Lawyers to Represent Parties in International and Interstate Arbitrations Conducted in New York,* 49 The Record 47 (1991). Commentators agree with this proposition:

> The requirement that every party to any arbitration proceeding be represented by an attorney would have a most deleterious, if not fatal, effect on the arbitral process. The informality, flexibility, privacy, speed, efficiency and economy of arbitration would be greatly diminished.

Gerald Asken, *Arbitration and the Unauthorized Practice of Law,* N.Y. L.J. Vol. 172 – No. 112 (Dec. 11, 1974).

Should the out-of-state lawyer, however, have to risk prosecution by relying on some court's holding that arbitration practice does not constitute the practice of law? Should this lawyer have to risk that courts will not give effect to the terms in the arbitration agreement? And should the client be forced to accept its second or third choice of counsel?

In light of the vast conflicts and uncertainty this decision has created, this Court should grant this petition and set a uniform national standard to guide clients and lawyers alike. This Court has yet to address the interstate commerce issues inherent in the multi-jurisdictional practice of law, and certainly these same issues will be commonly re-visited by courts across the nation. *See Fought & Co. v. Steel Eng'g & Erection, Inc.,* 1998 Haw. LEXIS 8.

The impact of this decision is far-reaching and threatens the ability of many businesses to conduct interstate commerce. Resolving the question of when an

attorney can represent a client engaged in interstate commerce will ensure such commerce proceed with little interference.

IV. The California Supreme Court's Decision Conflicts with the Federal Arbitration Act

The Federal Arbitration Act (9 U.S.C. § 1 et seq.) governs arbitrations affecting interstate commerce or maritime affairs. The FAA is "a congressional declaration of a liberal federal policy favoring arbitration agreements" that preempts any state substantive or procedural policies to the contrary. *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).[5]

California's UPL statute, as applied by the California Supreme Court, does not foster the federal policy favoring arbitration. Because there is no pro hac vice process for private arbitration, out-of-state attorneys are prohibited from conducting a private arbitration in California. As discussed above, this creates a tremendous burden for out-of-state businesses as they are forced to retain California lawyers in addition to their out-of-state general counsel. By making it more difficult for parties to arbitrate disputes involving interstate commerce, the California Supreme Court has undermined the very goals and policies Congress sought to advance.

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[5] *See also* Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 Wake Forest L. Rev. 1, 37 (1996) ("In contracts involving or affecting interstate commerce, state arbitration acts and other statutes attempting to eviscerate or limit the commercial arbitration process are, by definition, rendered moot by the pro arbitration policy of the FAA.").

Just as the states cannot regulate the practice of law before federal courts and administrative agencies (*see Sperry v. Florida*, 373 U.S. 379 (1963); Thomas J. Andersen, *The Federal Practice Exception: Limitations on State Regulation of Federal Practitioners*, 23 W. St. L. Rev. 281 (1996)), they should not be able to prohibit out-of-state lawyers from representing clients in arbitrations subject to the FAA.

Congress and this Court have recognized the importance of ensuring that arbitration remains a viable and efficient form of alternative dispute resolution. Preventing clients from retaining their out-of-state general counsel in California arbitrations vitiates these goals. Accordingly, pursuant to the Supremacy Clause of the United States Constitution, this Court should grant certiorari and find that California's UPL statute, as applied, conflicts with the FAA and is unenforceable.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., et al., Petitioners, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; ESQ BUSINESS SERVICES, INC., Real Party in Interest.

S057125

SUPREME COURT OF CALIFORNIA

17 Cal. 4th 119; 949 P.2d 1; 1998 Cal. LEXIS 2; 70 Cal. Rptr. 2d 304; 97 Cal. Daily Op. Service 51; 98 Daily Journal DAR 107

January 5, 1998, Filed

SUBSEQUENT HISTORY: As Modified, February 25, 1998.

PRIOR HISTORY: Court of Appeal of California, Sixth Appellate District. H014880. Superior Court of Santa Clara County. Santa Clara County Super. Ct. No. CV737595. John F. Herlihy, Judge.

COUNSEL: Halley, Cornel & Lynch, Roger C. Peters, Hoge, Fenton, Jones & Appel, David P. Eby, William J. Elfving and Scott R. Mosko, for Petitioners.

Latham & Watkins, Joseph A. Wheelock, Jr., and Julie V. King, as Amici Curiae on behalf of Petitioners.

No appearance for Respondent.

Hopkins & Carley, Jon Michaelson, Denise Y. Yamamoto and Robert W. Ricketson, for Real Party in Interest.

Diane C. Yu, Lawrence C. Yee, Mark Torres-Gil, and Robert M. Sweet as Amici Curiae on behalf of Real Party in Interest.

JUDGES: CHIN, J. WE CONCUR: GEORGE, C.J., MOSK, J., BAXTER, J., WERDEGAR, J., BROWN, J. DISSENTING OPINION BY KENNARD, J.

OPINION BY: CHIN

OPINION:

Business and Professions Code section 6125 states: "No person shall practice law in California unless the person is an active member of the State Bar."[1] We must decide whether an out-of-state law firm, not licensed to practice law in this state, violated section 6125 when it performed legal services in California for a California-based client under a fee agreement stipulating that California law would govern all matters in the representation.

Although we are aware of the interstate nature of modern law practice and mindful of the reality that large firms often conduct activities and serve clients in several states, we do not believe these facts excuse law firms from complying with section 6125. Contrary to the Court of Appeal, however, we do not believe the Legislature intended section 6125 to apply to those services an out-of-state firm renders in its home state. We therefore conclude that, to the extent defendant law firm Birbrower, Montalbano, Condon & Frank, P.C. (Birbrower), practiced law in California without a license, it engaged in the unauthorized practice of law in this state. (§ 6125.) We also conclude that Birbrower's fee agreement with real party in interest ESQ Business Services, Inc. (ESQ), is

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[1] All further statutory references are to the Business and Professions Code unless otherwise specified.

invalid to the extent it authorizes payment for the substantial legal services Birbrower performed in California. If, however, Birbrower can show it generated fees under its agreement for limited services it performed in New York, and it earned those fees under the otherwise invalid fee agreement, it may, on remand, present to the trial court evidence justifying its recovery of fees for those New York services. Conversely, ESQ will have an opportunity to produce contrary evidence. Accordingly, we affirm the Court of Appeal judgment in part and reverse it in part, remanding for further proceedings consistent with this opinion.

I. BACKGROUND

The facts with respect to the unauthorized practice of law question are essentially undisputed. Birbrower is a professional law corporation incorporated in New York, with its principal place of business in New York. During 1992 and 1993, Birbrower attorneys, defendants Kevin F. Hobbs and Thomas A. Condon (Hobbs and Condon), performed substantial work in California relating to the law firm's representation of ESQ. Neither Hobbs nor Condon has ever been licensed to practice law in California. None of Birbrower's attorneys were licensed to practice law in California during Birbrower's ESQ representation.

ESQ is a California corporation with its principal place of business in Santa Clara County. In July 1992, the parties negotiated and executed the fee agreement in New York, providing that Birbrower would perform legal services for ESQ, including "All matters pertaining to the

investigation of and prosecution of all claims and causes of action against TANDEM COMPUTERS INCORPORATED [Tandem]." The "claims and causes of action" against Tandem, a Delaware corporation with its principal place of business in Santa Clara County, California, related to a software development and marketing contract between Tandem and ESQ dated March 16, 1990 (Tandem Agreement). The Tandem Agreement stated that "The internal laws of the State of California (irrespective of its choice of law principles) shall govern the validity of this Agreement, the construction of its terms, and the interpretation and enforcement of the rights and duties of the parties hereto." Birbrower asserts, and ESQ disputes, that ESQ knew Birbrower was not licensed to practice law in California.

While representing ESQ, Hobbs and Condon traveled to California on several occasions. In August 1992, they met in California with ESQ and its accountants. During these meetings, Hobbs and Condon discussed various matters related to ESQ's dispute with Tandem and strategy for resolving the dispute. They made recommendations and gave advice. During this California trip, Hobbs and Condon also met with Tandem representatives on four or five occasions during a two-day period. At the meetings, Hobbs and Condon spoke on ESQ's behalf. Hobbs demanded that Tandem pay ESQ $15 million. Condon told Tandem he believed that damages would exceed $15 million if the parties litigated the dispute.

Around March or April 1993, Hobbs, Condon, and another Birbrower attorney visited California to interview potential arbitrators and to meet again with ESQ and its accountants. Birbrower had previously filed a

demand for arbitration against Tandem with the San Francisco offices of the American Arbitration Association (AAA). In August 1993, Hobbs returned to California to assist ESQ in settling the Tandem matter. While in California, Hobbs met with ESQ and its accountants to discuss a proposed settlement agreement Tandem authored. Hobbs also met with Tandem representatives to discuss possible changes in the proposed agreement. Hobbs gave ESQ legal advice during this trip, including his opinion that ESQ should not settle with Tandem on the terms proposed.

ESQ eventually settled the Tandem dispute, and the matter never went to arbitration. But before the settlement, ESQ and Birbrower modified the contingency fee agreement.[2] The modification changed the fee arrangement from contingency to fixed fee, providing that ESQ would pay Birbrower over $1 million. The original contingency fee arrangement had called for Birbrower to receive "one-third (1/3) of all sums received for the benefit of the Clients . . . whether obtained through settlement, motion practice, hearing, arbitration, or trial by way of judgment, award, settlement, or otherwise. . . ."

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[2] Birbrower's brief refers to the "Fee Agreement" without specifying whether it means the original contingency agreement or the later modified fixed fee agreement. The operative fee agreement that would be enforced is in dispute, and, as explained below, is subject to clarification on remand. To avoid confusion, we simply refer to one "fee agreement" for purposes of our analysis.

In January 1994, ESQ sued Birbrower for legal malpractice and related claims in Santa Clara County Superior Court. Birbrower removed the matter to federal court and filed a counterclaim, which included a claim for attorney fees for the work it performed in both California and New York. The matter was then remanded to the superior court. There ESQ moved for summary judgment and/or adjudication on the first through fourth causes of action of Birbrower's counterclaim, which asserted ESQ and its representatives breached the fee agreement. ESQ argued that by practicing law without a license in California and by failing to associate legal counsel while doing so, Birbrower violated section 6125, rendering the fee agreement unenforceable. Based on these undisputed facts, the Santa Clara Superior Court granted ESQ's motion for summary adjudication of the first through fourth causes of action in Birbrower's counterclaim. The court also granted summary adjudication in favor of ESQ's third and fourth causes of action in its second amended complaint, seeking declaratory-relief as to the validity of the fee agreement and its modification. The court concluded that: (1) Birbrower was "not admitted to the practice of law in California"; (2) Birbrower "did not associate California counsel";[3] (3) Birbrower "provided legal services in this state"; and (4) "The law is clear that no one may recover compensation for services as an attorney in this state unless he or she was a member of the state bar at the time those services were performed."

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[3] Contrary to the trial court's implied assumption, no statutory exception to section 6125 allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar.

Although the trial court's order stated that the fee agreements were unenforceable, at the hearing on the summary adjudication motion, the trial court also observed: "It seems to me that those are some of the issues that this Court has to struggle with, and then it becomes a question of if they aren't allowed to collect their attorney's fees here, I don't think that puts the attorneys in a position from being precluded from collecting all of their attorney's fees, only those fees probably that were generated by virtue of work that they performed in California and not that work that was performed in New York."

In granting limited summary adjudication, the trial court left open the following issues for resolution: ESQ's malpractice action against Birbrower, and the remaining causes of action in Birbrower's counterclaim, including Birbrower's fifth cause of action for quantum meruit (seeking the reasonable value of legal services provided).

Birbrower petitioned the Court of Appeal for a writ of mandate directing the trial court to vacate the summary adjudication order. The Court of Appeal denied Birbrower's petition and affirmed the trial court's order, holding that Birbrower violated section 6125. The Court of Appeal also concluded that Birbrower's violation barred the firm from recovering its legal fees under the written fee agreement, including fees generated in New York by the attorneys when they were physically present in New York, because the agreement included payment for California or "local" services for a California client in California. The Court of Appeal agreed with the trial court, however, in deciding that Birbrower could pursue

its remaining claims against ESQ, including its equitable claim for recovery of its fees in quantum meruit.

We granted review to determine whether Birbrower's actions and services performed while representing ESQ in California constituted the unauthorized practice of law under section 6125 and, if so, whether a section 6125 violation rendered the fee agreement wholly unenforceable.

II. DISCUSSION

A. The Unauthorized Practice of Law

The California Legislature enacted section 6125 in 1927 as part of the State Bar Act (the Act), a comprehensive scheme regulating the practice of law in the state. (*J.W. v. Superior Court* (1993) 17 Cal.App.4th 958, 965 (*J.W.*).) Since the Act's passage, the general rule has been that, although persons may represent themselves and their own interests regardless of State Bar membership, no one but an active member of the State Bar may practice law for another person in California. (*Ibid.*) The prohibition against unauthorized law practice is within the state's police power and is designed to ensure that those performing legal services do so competently. (*Id.* at p. 969.)

A violation of section 6125 is a misdemeanor. (§ 6126.) Moreover, "No one may recover compensation for services as an attorney at law in this state unless [the person] was at the time the services were performed a member of The State Bar." (*Hardy v. San Fernando Valley C. of C.* (1950) 99 Cal.App.2d 572, 576, 222 P.2d 314 (*Hardy*).)

Although the Act did not define the term "practice law," case law explained it as "the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure." (*People ex rel. Lawyers' Institute of San Diego v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535, 209 P. 363 (*Merchants*).) *Merchants* included in its definition legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation. (*Ibid.*; see *People v. Ring* (1937) 26 Cal.App.2d. Supp. 768, 772-773, 70 P.2d 281 (*Ring*) [holding that single incident of practicing law in state without a license violates § 6125]; see also *Mickel v. Murphy* (1957) 147 Cal.App.2d 718, 721, 305 P.2d 993 [giving of legal advice on matter not pending before state court violates § 6125], disapproved on other grounds in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 651, 320 P.2d 16.) *Ring* later determined that the Legislature "accepted both the definition already judicially supplied for the term and the declaration of the Supreme Court [in *Merchants*] that it had a sufficiently definite meaning to need no further definition. The definition . . . must be regarded as definitely establishing, for the jurisprudence of this state, the meaning of the term 'practice law.' " (*Ring, supra*, 26 Cal.App.2d Supp. at p. 772.)

In addition to not defining the term "practice law," the Act also did not define the meaning of "in California." In today's legal practice, questions often arise concerning whether the phrase refers to the nature of the legal services, or restricts the Act's application to those out-of-state attorneys who are physically present in the state.

Section 6125 has generated numerous opinions on the meaning of "practice law" but none on the meaning of "in California." In our view, the practice of law "in California" entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law "in California." The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.

Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive. For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person *automatically* practices law "in California" whenever that person practices California law anywhere, or "virtually" enters the state by telephone, fax, e-mail, or satellite. (See e.g., *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543, 86 Cal.Rptr.

673, 469 P.2d 353 (*Baron*) ["practice law" does not encompass all professional activities].) Indeed, we disapprove *Ring, supra,* 26 Cal.App.2d Supp. 768, and its progeny to the extent the cases are inconsistent with our discussion. We must decide each case on its individual facts.

This interpretation acknowledges the tension that exists between interjurisdictional practice and the need to have a state-regulated bar. As stated in the American Bar Association Model Code of Professional Responsibility, Ethical Consideration EC 3-9, "Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice." (Fns. omitted.) *Baron* implicitly agrees with this canon. (*Baron, supra,* 2 Cal.3d at p. 543.)

If we were to carry the dissent's narrow interpretation of the term "practice law" to its logical conclusion, we would effectively limit section 6125's application to those cases in which nonlicensed out-of-state lawyers appeared in a California courtroom without permission.

(Dis. opn., *post*, 1998 Cal. LEXIS 2 at pp. *48.) Clearly, neither *Merchants, supra*, 189 Cal. at page 535, nor *Baron, supra*, 2 Cal.3d at page 543, supports the dissent's fanciful interpretation of the thoughtful guidelines announced in those cases. Indeed, the dissent's definition of "practice law" ignores *Merchants* altogether, and, in so doing, substantially undermines the Legislature's intent to protect the public from those giving unauthorized legal advice and counsel.

Exceptions to section 6125 do exist, but are generally limited to allowing out-of-state attorneys to make brief appearances before a state court or tribunal. They are narrowly drawn and strictly interpreted. For example, an out-of-state attorney not licensed to practice in California may be permitted, *by consent of a trial judge*, to appear in California in a particular pending action. (See *In re McCue* (1930) 211 Cal. 57, 67, 293 P. 47; 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 402, p. 493.)

In addition, with the permission of the California court in which a particular cause is pending, out-of-state counsel may appear before a court as counsel pro hac vice. (Cal. Rules of Court, rule 983.) A court will approve a pro hac vice application only if the out-of-state attorney is a member in good standing of another state bar and is eligible to practice in any United States court or the highest court in another jurisdiction. (Cal. Rules of Court, rule 983(a).) The out-of-state attorney must also associate an active member of the California Bar as attorney of record and is subject to the Rules of Professional Conduct of the State Bar. (Cal. Rules of Court, rules 983(a), (d); see Rules Prof. Conduct, rule 1-100(D)(2) [includes lawyers

from other jurisdictions authorized to practice in this state].)

The Act does not regulate practice before United States courts. Thus, an out-of-state attorney engaged to render services in bankruptcy proceedings was entitled to collect his fee. (*Cowen v. Calabrese* (1964) 230 Cal.App.2d 870, 872, 41 Cal.Rptr. 441 (*Cowen*); but see U.S. Dist. Ct. Local Rules, Northern Dist. Cal., rule 11-1(b); Eastern Dist. Cal., rule 83-180; Central Dist. Cal., rule 2.2.1; Southern Dist. Cal., rule 83.3(c)(1)(a) [today conditioning admission to their respective bars (with certain exceptions for some federal government employees) on active membership in good standing in California State Bar].)

Finally, California Rules of Court, rule 988, permits the State Bar to issue registration certificates to foreign legal consultants who may advise on the law of the foreign jurisdiction where they are admitted. These consultants may not, however, appear as attorneys before a California court or judicial officer or otherwise prepare pleadings and instruments in California or give advice on the law of California or any other state or jurisdiction except those where they are admitted.

The Legislature has recognized an exception to section 6125 in international disputes resolved in California under the state's rules for arbitration and conciliation of international commercial disputes. (Code Civ. Proc., § 1297.11 et seq.) This exception states that in a commercial conciliation in California involving international commercial disputes, "The parties may appear in person or be represented or assisted by any person of their choice. A person assisting or representing a party need

not be a member of the legal profession or licensed to practice law in California." (Code Civ. Proc., § 1297.351.) Likewise, the Act does not apply to the preparation of or participation in labor negotiations and arbitrations arising under collective bargaining agreements in industries subject to federal law. (See, e.g., *Teamsters Local v. Lucas Flour Co.* (1962) 369 U.S. 95, 103; see also *Labor-Management Relations Act of 1947*, 29 U.S.C. §§ 185(a).)

B. The Present Case

The undisputed facts here show that neither *Baron's* definition (*Baron, supra*, 2 Cal.3d at p. 543) nor our "sufficient contact" definition of "practice law in California" (*ante*, at p. 10) would excuse Birbrower's extensive practice in this state. Nor would any of the limited statutory exceptions to section 6125 apply to Birbrower's California practice. As the Court of Appeal observed, Birbrower engaged in unauthorized law practice *in California* on more than a limited basis, and no firm attorney engaged in that practice was an active member of the California State Bar. As noted (*ante*, 1998 Cal. LEXIS 2 at pp. *4-6), in 1992 and 1993, Birbrower attorneys traveled to California to discuss with ESQ and others various matters pertaining to the dispute between ESQ and Tandem. Hobbs and Condon discussed strategy for resolving the dispute and advised ESQ on this strategy. Furthermore, during California meetings with Tandem representatives in August 1992, Hobbs demanded Tandem pay $15 million, and Condon told Tandem he believed damages in the matter would exceed that amount if the parties proceeded to litigation. Also in California, Hobbs met with ESQ for the stated purpose of helping to reach a settlement agreement

and to discuss the agreement that was eventually proposed. Birbrower attorneys also traveled to California to initiate arbitration proceedings before the matter was settled. As the Court of Appeal concluded, " . . . the Birbrower firm's in-state activities clearly constituted the [unauthorized] practice of law" *in California.*

Birbrower contends, however, that section 6125 is not meant to apply to *any* out-of-state *attorneys.* Instead, it argues that the statute is intended solely to prevent nonattorneys from practicing law. This contention is without merit because it contravenes the plain language of the statute. Section 6125 clearly states that *no person* shall practice law in California unless that person is a member of the State Bar. The statute does not differentiate between attorneys or nonattorneys, nor does it excuse a person who is a member of another state bar. It is well settled that, in determining the meaning of a statute, we look to its words and give them their usual and ordinary meaning. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601, 828 P.2d 140; *Kimmel v. Goland* (1990) 51 Cal.3d 202, 208-209, 271 Cal.Rptr. 191, 793 P.2d 524.) "If statutory language is 'clear and unambiguous there is no need for construction, and courts should not indulge in it.' [Citation.]" (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 218, 188 Cal.Rptr. 115, 655 P.2d 317.) The plain meaning controls our interpretation of the statute here because Birbrower has not shown "that the natural and customary import of the statute's language is either 'repugnant to the general purview of the act' or for some other compelling reason, should be disregarded . . . . " (33 Cal.3d at pp. 218-219.)

Birbrower next argues that we do not further the statute's intent and purpose – to protect California citizens from incompetent attorneys – by enforcing it against out-of-state attorneys. Birbrower argues that because out-of-state attorneys have been licensed to practice in other jurisdictions, they have already demonstrated sufficient competence to protect California clients. But Birbrower's argument overlooks the obvious fact that other states' laws may differ substantially from California law. Competence in one jurisdiction does not necessarily guarantee competence in another. By applying section 6125 to out-of-state attorneys who engage in the extensive practice of law in California without becoming licensed in our state, we serve the statute's goal of assuring the competence of all attorneys practicing law in this state. (*J.W., supra,* 17 Cal.App.4th at p. 969.)

California is not alone in regulating who practices law in its jurisdiction. Many states have substantially similar statutes that serve to protect their citizens from unlicensed attorneys who engage in unauthorized legal practice. Like section 6125, these other state statutes protect local citizens "against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions." (*Spivak v. Sachs* (1965) 16 N.Y.2d 163 [211 N.E.2d 329, 331, 263 N.Y.S.2d 953].) Whether an attorney is duly admitted in another state and is, in fact, competent to practice in California is irrelevant in the face of section 6125's language and purpose. (See *Ranta v. McCarney* (N.D.1986) 391 N.W.2d 161, 163 (*Ranta*) [noting that out-of-state attorney's competence is irrelevant because purpose of North Dakota law

against unauthorized law practice is to assure competence *before* attorney practices in state].) Moreover, as the North Dakota Supreme Court pointed out in *Ranta*: "It may be that such an [out-of-state attorney] exception is warranted, but such a plea is more properly made to a legislative committee considering a bill enacting such an exception or to this court in its rule-making function than it is in a judicial decision." (*Id.* at p. 165.) Similarly, a decision to except out-of-state attorneys licensed in their own jurisdictions from section 6125 is more appropriately left to the California Legislature.

Assuming that section 6125 does apply to out-of-state attorneys not licensed here, Birbrower alternatively asks us to create an exception to section 6125 for work incidental to private arbitration or other alternative dispute resolution proceedings. Birbrower points to fundamental differences between private arbitration and legal proceedings, including procedural differences relating to discovery, rules of evidence, compulsory process, cross-examination of witnesses, and other areas. (See *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 57-58, 39 L.Ed.2d 147, 94 S.Ct. 1011 [illustrating differences between arbitration and court proceedings].) As Birbrower observes, in light of these differences, at least one court has decided that an out-of-state attorney could recover fees for services rendered in an arbitration proceeding. (See *Williamson v. John D. Quinn Const. Corp.* (S.D.N.Y. 1982) 537 F.Supp. 613, 616 (*Williamson*).)

In *Williamson*, a New Jersey law firm was employed by a client's New York law firm to defend a construction contract arbitration in New York. It sought to recover fees solely related to the arbitration proceedings, even though

the attorney who did the work was not licensed in New York, nor was the firm authorized to practice in the state. (*Williamson, supra*, 537 F.Supp. at p. 616.) In allowing the New Jersey firm to recover its arbitration fees, the federal district court concluded that an arbitration tribunal is not a court of record, and its factfinding process is not similar to a court's process. (*Ibid.*) The court relied on a local state bar report concluding that representing a client in an arbitration was not the unauthorized practice of law. (*Ibid.*; see Com. Rep., Labor Arbitration and the Unauthorized Practice of Law (May/June 1975) 30 Record of the Association of the Bar of the City of New York, No. 5/6) But as amicus curiae the State Bar of California observes, "While in *Williamson* the federal district court did allow the New Jersey attorneys to recover their fees, that decision clearly is distinguishable on its facts. . . . [P] In the instant case, it is undisputed that none of the time that the New York attorneys spent in California was" spent in arbitration; *Williamson* thus carries limited weight. (See also *Moore v. Conliffe* (1994) 7 Cal.4th 634, 637-638, 871 P.2d 204 [private AAA arbitration functionally equivalent to judicial proceeding to which litigation privilege applies].) Birbrower also relies on California's rules for arbitration and conciliation of international commercial disputes for support. (Code Civ. Proc., § 1297.11 et seq.) As noted (*ante*, at 1998 Cal. LEXIS 2 at p. *18), these rules specify that, in an international commercial conciliation or arbitration proceeding, the person representing a party to the conciliation or arbitration is not required to be a licensed member of the State Bar. (Code Civ. Proc., § 1297.351.)

We decline Birbrower's invitation to craft an arbitration exception to section 6125's prohibition of the unlicensed practice of law in this state. Any exception for arbitration is best left to the Legislature, which has the authority to determine qualifications for admission to the State Bar and to decide what constitutes the practice of law. (*Baron, supra*, 2 Cal.3d at pp. 540-541; see also *Eagle Indem. Co. v. Industrial Acc. Com.* (1933) 217 Cal. 244, 247, 18 P.2d 341.) Even though the Legislature has spoken with respect to *international* arbitration and conciliation, it has not enacted a similar rule for private arbitration proceedings. Of course, private arbitration and other alternative dispute resolution practices are important aspects of our justice system. (See *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9, 832 P.2d 899 [noting a strong public policy in favor of arbitration].) Section 6125, however, articulates a strong public policy favoring the practice of law in California by licensed State Bar members. In the face of the Legislature's silence, we will not create an arbitration exception under the facts presented. (See *Baron, supra*, 2 Cal.3d at pp. 540-541 [membership, character, and conduct of attorneys is proper subject of state legislative regulation and control].)[4]

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[4] The dissent focuses on an arbitrator's powers in an attempt to justify its conclusion that an out-of-state attorney may engage in the unlicensed representation of a client in an arbitration proceeding. (See dis. opn. *post*, at 1998 Cal. LEXIS 2 at pp. 54-55.) This narrow focus confuses the issue here. An arbitrator's powers to enforce a contract or "award an essentially unlimited range of remedies" has no bearing on the question whether unlicensed out-of-state attorneys may represent California clients in an arbitration proceeding. (Dis. opn., *post*, at 1998 Cal. LEXIS 2 at p. 54.) Moreover, any

In its reply brief to the State Bar's amicus curiae brief, Birbrower raises for the first time the additional argument that the Federal Arbitration Act (FAA) preempted the rules governing the AAA proposed arbitration and section 6125. The FAA regulates arbitration that deals with maritime transactions and contracts involving the transportation of goods through interstate or foreign commerce. (9 U.S.C. § 1 et seq.) Although we need not address the question under California Rules of Court, rule 29(b)(1), and note the parties' settlement agreement rendered the arbitration unnecessary, we reject the argument for its lack of merit. First, the parties incorporated a California choice-of-law provision in the Tandem Agreement, indicating they intended to apply California law in any necessary arbitration, and they have not shown that California law in any way conflicts with the FAA. Moreover, in interpreting the California Arbitration Act stay provisions (Code Civ. Proc., § 1281.2, subd. (c)), the high court observed that the FAA does not contain an express preemptive provision, nor does it "reflect a congressional intent to occupy the entire field of arbitration." (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 477, 109 S.Ct. 1248, 103 L.Ed.2d 488.)

Finally, Birbrower urges us to adopt an exception to section 6125 based on the unique circumstances of this case. Birbrower notes that "Multistate relationships are a

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discussion of the practice of law in an arbitration proceeding is irrelevant here because the parties settled the underlying case before arbitration proceedings became necessary. Nonetheless, we emphasize that, in the absence of clear legislative direction, we decline to create an exception allowing unlicensed legal practice in arbitration in violation of section 6125.

common part of today's society and are to be dealt with in commonsense fashion." (*In re Estate of Waring* (1966) 47 N.J. 367 [221 A.2d 193, 197].) In many situations, strict adherence to rules prohibiting the unauthorized practice of law by out-of-state attorneys would be " 'grossly impractical and inefficient.' " (*Ibid.*; see also *Appell v. Reiner* (1964) 43 N.J. 313 [204 A.2d 146, 148] [strict adherence to rule barring out-of-state lawyers from representing New Jersey residents on New Jersey matters may run against the public interest when case involves inseparable multistate transactions].)

Although, as discussed (*ante*, 1998 Cal. LEXIS 2 at pp. *16-18), we recognize the need to acknowledge and, in certain cases, accommodate the multistate nature of law practice, the facts here show that Birbrower's extensive activities within California amounted to considerably more than any of our state's recognized exceptions to section 6125 would allow. Accordingly, we reject Birbrower's suggestion that we except the firm from section 6125's rule under the circumstances here.

C. Compensation for Legal Services

Because Birbrower violated section 6125 when it engaged in the unlawful practice of law in California, the Court of Appeal found its fee agreement with ESQ unenforceable in its entirety. Without crediting Birbrower for some services performed in New York, for which fees were generated under the fee agreement, the court reasoned that the agreement was void and unenforceable because it included payment for services rendered to a California client in the state by an unlicensed out-of-state

lawyer. The court opined that "When New York counsel decided to accept [the] representation, it should have researched California law, including the law governing the practice of law in this state." The Court of Appeal let stand, however, the trial court's decision to allow Birbrower to pursue its fifth cause of action in quantum meruit.[5] We agree with the Court of Appeal to the extent it barred Birbrower from recovering fees generated under the fee agreement for the unauthorized legal services it performed in California. We disagree with the same court to the extent it implicitly barred Birbrower from recovering fees generated under the fee agreement for the limited legal services the firm performed in New York.

It is a general rule that an attorney is barred from recovering compensation for services rendered in another state where the attorney was not admitted to the bar. (Annot., Right of Attorney Admitted in One State to Recover Compensation for Services Rendered in Another State Where He Was Not Admitted to the Bar (1967) 11 A.L.R.3d 907; *Hardy, supra*, 99 Cal.App.2d at p. 576.) The general rule, however, has some recognized exceptions.

Initially, Birbrower seeks enforcement of the entire fee agreement, relying first on the federal court exception discussed *ante*, at 1998 Cal. LEXIS 2 page *17. (*Cowen, supra*, 230 Cal.App.2d at p. 872; *In re McCue, supra*, 211 Cal. at p. 66; see Annot., *supra*, 11 A.L.R.3d at pp. 912-913

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[5] We observe that ESQ did not seek (and thus the court did not grant) summary adjudication on the Birbrower firm's quantum meruit claim for the reasonable value of services rendered. Birbrower thus still has a cause of action pending in quantum meruit.

[citing Cowen as exception to general rule of nonrecovery].) This exception does not apply in this case; none of Birbrower's activities related to federal court practice.

A second exception on which Birbrower relies to enforce its entire fee agreement relates to "Services not involving courtroom appearance." (Annot., *supra*, 11 A.L.R.3d at p. 911 [*citing Wescott v. Baker* (N.J. 1912) 83 N.J.L. 460, 85 A. 315].) California has implicitly rejected this broad exception through its comprehensive definition of what it means to "practice law." Thus, the exception Birbrower seeks for all services performed outside the courtroom in our state is too broad under section 6125.

Some jurisdictions have adopted a third exception to the general rule of nonrecovery for in-state services, if an out-of-state attorney "makes a full disclosure to his client of his lack of local license and does not conceal or misrepresent the true facts." (Annot., *supra*, 11 A.L.R.3d at p. 910.) For example, in *Freeling v. Tucker* (Idaho 1930) 49 Idaho 475, 289 P. 85, the court allowed an Oklahoma attorney to recover for services rendered in an Idaho probate court. Even though an Idaho statute prohibited the unlicensed practice of law, the court excused the Oklahoma attorney's unlicensed representation because he had not falsely represented himself nor deceptively held himself out to the client as qualified to practice in the jurisdiction. (289 P. at p. 86.) In this case, Birbrower alleges that ESQ at all times knew that the firm was not licensed to practice law in California. Even assuming that is true, however, we reject the full disclosure exception for the same reasons we reject the argument that section 6125 is not meant to apply to nonattorneys. Recognizing

these exceptions would contravene not only the plain language of section 6125 but the underlying policy of assuring the competence of those practicing law in California.

Therefore, as the Court of Appeal held, none of the exceptions to the general rule prohibiting recovery of fees generated by the unauthorized practice of law apply to Birbrower's activities in California. Because Birbrower practiced substantial law in this state in violation of section 6125, it cannot receive compensation under the fee agreement for any of the services it performed in California. Enforcing the fee agreement in its entirety would include payment for the unauthorized practice of law in California and would allow Birbrower to enforce an illegal contract. (*See Hardy, supra,* 99 Cal.App.2d at p. 576.)

Birbrower asserts that even if we agree with the Court of Appeal and find that none of the above exceptions allowing fees for unauthorized California services apply to the firm, it should be permitted to recover fees for those limited services it performed exclusively *in New York* under the agreement. In short, Birbrower seeks to recover under its contract for those services it performed for ESQ in New York that did not involve the practice of law in California, including fee contract negotiations and some corporate case research. Birbrower thus alternatively seeks reversal of the Court of Appeal's judgment to the extent it implicitly precluded the firm from seeking fees generated in New York under the fee agreement.

We agree with Birbrower that it may be able to recover fees under the fee agreement for the limited legal

services it performed for ESQ in New York to the extent they did not constitute practicing law in California, even though those services were performed for a California client. Because section 6125 applies to the practice of law in California, it does not, in general, regulate law practice in other states. (See *ante*, 1998 Cal. LEXIS 2 at pp. *13-20.) Thus, although the general rule against compensation to out-of-state attorneys precludes Birbrower's recovery under the fee agreement for its actions in California, the severability doctrine may allow it to receive its New York fees generated under the fee agreement, if we conclude the illegal portions of the agreement pertaining to the practice of law in California may be severed from those parts regarding services Birbrower performed in New York. (See Annot., *supra*, 11 A.L.R.3d at pp. 908-909 and cases cited [bar on recovery by out-of-state attorney extends only to compensation for local services]; see also *Ranta, supra*, 391 N.W.2d at p. 166 [remanding case to determine which fees related to practice locally and which related to attorney's work in state where he was licensed].)

The law of contract severability is stated in Civil Code section 1599, which defines partially void contracts: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." In *Calvert v. Stoner* (1948) 33 Cal.2d 97, 199 P.2d 297 (*Calvert*), we considered whether a contingent fee contract containing a provision restricting a party's right to compromise a suit without her attorney's consent was void entirely or severable in part. (*Id.* at p. 103.) We observed that "It is unnecessary . . . to determine

whether the particular provision is invalid as against public policy. It is sufficient to observe, assuming such invalidity, that in this state . . . the compensation features of the contract are not thereby deemed affected if in other respects the contract is lawful." (*Id.* at p. 104.) Calvert concluded that the invalid provision preventing the client from compromising the suit could be severed from the valid provision for attorney fees. (*Ibid.*)

The fee agreement between Birbrower and ESQ became illegal when Birbrower performed legal services in violation of section 6125. It is true that courts will not ordinarily aid in enforcing an agreement that is either illegal or against public policy. (*Asdourian v. Araj* (1985) 38 Cal.3d 276, 291, 211 Cal.Rptr. 703, 696 P.2d 95; *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109-1110, 260 Cal.Rptr. 6.) Illegal contracts, however, will be enforced under certain circumstances, such as when only a part of the consideration given for the contract involves illegality. In other words, notwithstanding an illegal consideration, courts may sever the illegal portion of the contract from the rest of the agreement. (*Keene v. Harling* (1964) 61 Cal.2d 318, 320, 38 Cal.Rptr. 513, 392 P.2d 273 (*Keene*).) " ' "When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the Courts will make the distinction, for the . . . law . . . [divides] according to common reason; and having made that void that is against law, lets the rest stand. . . . " ' " (61 Cal.2d at pp. 320-321, *quoting Jackson v. Shawl* (1865) 29 Cal. 267, 272.) If the court is unable to distinguish between the lawful and unlawful parts of the agreement, "the illegality taints the entire

contract, and the entire transaction is illegal and unenforceable." (*Keene, supra,* 61 Cal.2d at p. 321.)

In *Keene,* the defendant agreed to pay the plaintiffs $50,000 in exchange for their business involving coin-operated machines. The defendant defaulted on his payments, and the plaintiffs sued. The defendant argued that the sales agreement was void because part of the sale involved machines that were illegal under a California penal statute. The court affirmed the lower court's determination that the price of the illegal machines could be deducted from the amount due on the original contract. "Since the consideration on the buyer's side was money, the court properly construed the contract by equating the established market price of the illegal machines to a portion of the money consideration." (*Keene, supra,* 61 Cal.2d at p. 323.) Thus, even though the entire contract was for a fixed sum, the court was able to value the illegal portion of the contract and separate it from the rest of the amount due under the agreement.

In this case, the parties entered into a contingency fee agreement followed by a fixed fee agreement.[6] ESQ was

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[6] The parties apparently do not dispute that they modified the original contingency fee arrangement to call for a fixed fee payment of over $1 million. They dispute, however, whether the original contingency fee arrangement became operative once again when ESQ failed to make a payment to Birbrower under the fixed fee arrangement. Because the trial court and the Court of Appeal believed the fee agreements to be unenforceable in their entirety, neither court addressed issues relating to the fee agreements themselves or the parties' disputes surrounding those agreements. We agree with the Court of Appeal that issues surrounding the two fee agreements and the applicability of

to pay money to Birbrower in exchange for Birbrower's legal services. The object of their agreement may not have been entirely illegal, assuming ESQ was to pay Birbrower compensation based in part on work Birbrower performed in New York that did not amount to the practice of law in California. The illegality arises, instead, out of the amount to be paid to Birbrower, which, if paid fully, would include payment for services rendered in California in violation of section 6125.

Therefore, we conclude the Court of Appeal erred in determining that the fee agreement between the parties was entirely unenforceable because Birbrower violated section 6125's prohibition against the unauthorized practice of law in California. Birbrower's statutory violation may require exclusion of the portion of the fee attributable to the substantial illegal services, but that violation does not necessarily entirely preclude its recovery under the fee agreement for the limited services it performed outside California. (*Calvert, supra,* 33 Cal.2d at pp. 104-105.)

Thus, the portion of the fee agreement between Birbrower and ESQ that includes payment for services rendered in New York may be enforceable to the extent that the illegal compensation can be severed from the rest of the agreement. On remand, therefore, the trial court must first resolve the dispute surrounding the parties' fee

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either section 6147 (regulating contents of contingency fee agreements) or the State Bar Rules of Professional Conduct, rules 3-300 and 4-200 (governing fees for legal services), are best resolved by the trial court on remand.

agreement and determine whether their agreement conforms to California law. If the parties and the court resolve the fee dispute and determine that one fee agreement is operable and does not violate any state drafting rules, the court may sever the illegal portion of the consideration (the value of the California services) from the rest of the fee agreement. Whether the trial court finds the contingent fee agreement or the fixed fee agreement to be valid, it will determine whether some amount is due under the valid agreement. The trial court must then determine, on evidence the parties present, how much of this sum is attributable to services Birbrower rendered in New York. The parties may then pursue their remaining claims.

III. DISPOSITION

We conclude that Birbrower violated section 6125 by practicing law in California. To the extent the fee agreement allows payment for those illegal local services, it is void, and Birbrower is not entitled to recover fees under the agreement for those services. The fee agreement is enforceable, however, to the extent it is possible to sever the portions of the consideration attributable to Birbrower's services illegally rendered in California from those attributable to Birbrower's New York services. Accordingly, we affirm the Court of Appeal judgment to the extent it concluded that Birbrower's representation of ESQ in California violated section 6125, and that Birbrower is not entitled to recover fees under the fee agreement for its local services. We reverse the judgment to the extent the court did not allow Birbrower to argue

in favor of a severance of the illegal portion of the consideration (for the California fees) from the rest of the fee agreement, and remand for further proceedings consistent with this decision.

CHIN, J.

WE CONCUR:

GEORGE, C.J.

MOSK, J.

BAXTER, J.

WERDEGAR, J.

BROWN, J.

DISSENT BY: KENNARD

DISSENT: DISSENTING OPINION BY KENNARD, J.

In California, it is a misdemeanor to practice law when one is not a member of the State Bar. (Bus. & Prof.Code, §§ 6125, 6126, subd. (a).) In this case, New York lawyers who were not members of the California Bar traveled to this state on several occasions, attempting to resolve a contract dispute between their clients and another corporation through negotiation and private arbitration. Their clients included a New York corporation and a sister corporation incorporated in California; the lawyers had in previous years represented the principal owners of these corporations. The majority holds that the New York lawyers' activities in California constituted the unauthorized practice of law. I disagree.

The majority focuses its attention on the question of whether the New York lawyers had engaged in the practice of law *in California*, giving scant consideration to a decisive preliminary inquiry: whether, through their activities here, the New York lawyers had engaged in the practice of law *at all*. In my view, the record does not show that they did. In reaching a contrary conclusion, the majority relies on an overbroad definition of the term "practice of law." I would adhere to this court's decision in *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 86 Cal.Rptr. 673, 469 P.2d 353, more narrowly defining the practice of law as the representation of another in a judicial proceeding or an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind. Under this definition, this case presents a triable issue of material fact as to whether the New York lawyers' California activities constituted the practice of law.

I

Defendant Birbrower, Montalbano, Condon & Frank (hereafter Birbrower) is a New York law firm. Its lawyers are not licensed to practice law in California.

Kamal Sandhu was the sole shareholder of ESQ Business Services Inc., a New York corporation (hereafter ESQ-NY), of which his brother Iqbal Sandhu was the vice-president. Beginning in 1986, Birbrower lawyers represented the Sandhu family in various business matters. In 1990, Kamal Sandhu asked Birbrower lawyer Kevin Hobbs to review a proposed software development and marketing agreement between ESQ-NY and Tandem

Computers (hereafter Tandem). The agreement granted Tandem worldwide distribution rights to computer software created by ESQ-NY. The agreement also provided that it would be governed by California law and that, according to Birbrower's undisputed assertion, disputes were to be resolved by arbitration under the rules of the American Arbitration Association. ESQ-NY and Tandem signed the agreement.

Thereafter, a second corporation, also named ESQ Business Services, Inc. (hereafter ESQ-CAL), was incorporated in California, with Iqbal Sandhu as a principal shareholder. In 1991, ESQ-CAL consulted Birbrower lawyers concerning Tandem's performance under the agreement. In 1992, ESQ-NY and ESQ-CAL jointly hired Birbrower to resolve the dispute with Tandem, including the investigation and prosecution of claims against Tandem if necessary. ESQ-NY and ESQ-CAL entered into a contingency fee agreement with Birbrower; this agreement was executed in New York but was later modified to a fixed fee agreement in California.

The efforts of the Birbrower lawyers to resolve the dispute with Tandem included several brief trips to California. On these trips, Birbrower lawyers met with officers of both ESQ-NY and ESQ-CAL and with representatives of Tandem; they also interviewed arbitrators and participated in negotiating the settlement of the dispute with Tandem. (Maj. opn., *ante*, at pp. 3-4.) On February 12, 1993, Birbrower initiated an arbitration proceeding against Tandem, on behalf of both ESQ-NY and ESQ-CAL, by filing a claim with the American Arbitration Association in San Francisco, California. Before an

arbitration hearing was held, the dispute with Tandem was settled.

In January 1994, ESQ-CAL and Iqbal Sandhu, the principal shareholder, sued Birbrower for malpractice. Birbrower cross-complained to recover its fees under the fee agreement. Plaintiffs ESQ-CAL and Iqbal Sandhu thereafter amended their complaint to add ESQ-NY as a plaintiff. Plaintiffs moved for summary adjudication, asserting the fee agreement was unenforceable because the Birbrower lawyers had engaged in the unauthorized practice of law in California. The trial court agreed, and granted plaintiffs' motion. The Court of Appeal upheld the trial court's ruling, as does a majority of this court today.

II

Business and Professions Code section 6125 states: "No person shall practice law in California unless the person is an active member of the State Bar." The Legislature, however, has not defined what constitutes the practice of law.

Pursuant to its inherent authority to define and regulate the practice of law (see, e.g., *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 728, 147 Cal.Rptr. 631, 581 P.2d 636; *In re Lavine* (1935) 2 Cal.2d 324, 328, 41 P.2d 161; *People v. Turner* (1850) 1 Cal. 143, 150), this court in 1922 defined the practice of law as follows: " 'As the term is generally understood, the practice of the law is the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted

rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which the legal rights are secured although such matter may or may not be depending in a court.' " (*People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535, 209 P. 363 (*Merchants*).) The Merchants court adopted this definition verbatim from a decision by the Indiana Court of Appeal, *Eley v. Miller* (1893) 7 Ind.App. 529, 34 N.E. 836, 837-838. (*Merchants, supra,* at p. 535.)

In 1970, in *Baron v. City of Los Angeles, supra,* 2 Cal.3d 535, 542 (*Baron*), this court reiterated the *Merchants* court's definition of the term "practice of law." We were quick to point out in *Baron,* however, that "ascertaining whether a particular activity falls within this general definition may be a formidable endeavor." (2 Cal.3d at p. 543.) *Baron* emphasized "that it is not the whole spectrum of professional services of lawyers with which the State Bar Act is most concerned, but rather it is the smaller area of activities defined as the 'practice of law.' " (*Ibid.*) It then observed: "In close cases, the courts have determined that the resolution of legal questions for another by advice and action is practicing law 'if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a *trained legal mind.*' [Citations.]" (*Ibid.*, italics added.) *Baron* added that "if the application of legal knowledge and technique is required, the activity constitutes the practice of law. . . . " (*Ibid.*, italics added.) This definition is quite similar to that proposed by Cornell Law School Professor Charles Wolfram, the Chief Reporter for the American Law Institute's Restatement of the Law Governing Lawyers: "The correct form of the test [for the practice of law] should

inquire whether the matter handled was of such complexity that only a person trained as a lawyer should be permitted to deal with it." (Wolfram, Modern Legal Ethics (1986) p. 836.)

The majority asserts that the definition of practice of law I have stated above misreads this court's opinion in *Baron*. (Maj. opn., *ante*, 1998 Cal. LEXIS 2 at p. *15-16.) But what the majority characterizes as "the dissent's fanciful interpretation of the [Baron court's] thoughtful guidelines" (maj. opn., *ante*, 1998 Cal. LEXIS 2 at p. *15) consists of language I have quoted directly from *Baron*.

The majority also charges that the narrowing construction of the term "practice of law" that this court adopted in *Baron* "effectively limits section 6125's application to those cases in which nonlicensed out-of-state lawyers appeared in a California courtroom without permission." (Maj. opn., *ante*, 1998 Cal. LEXIS 2 at p. *15.) Fiddlesticks. Because the *Baron* definition encompasses all activities that "reasonably demand application of a trained legal mind" (*Baron, supra*, 2 Cal.3d at p. 543), the majority's assertion would be true only if there were no activities, apart from court appearances, requiring application of a trained legal mind. Many attorneys would no doubt be surprised to learn that, for example, drafting testamentary documents for large estates, preparing merger agreements for multinational corporations, or researching complex legal issues are not activities that require a trained legal mind.

According to the majority, use of the *Baron* definition I have quoted would undermine protection of the public from incompetent legal practitioners. (Maj. opn., *ante*,

1998 Cal. LEXIS 2 at p. *15.) The *Baron* definition provides ample protection from incompetent legal practitioners without infringing upon the public's interest in obtaining advice and representation from other professionals, such as accountants and real estate brokers, whose skills in specialized areas may overlap with those of lawyers. This allows the public the freedom to choose professionals who may be able to provide the public with needed services at a more affordable cost. (See Wolfram, Modern Legal Ethics, *supra*, at p. 831; Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions* (1981) 34 Stan.L.Rev. 1, 97-98; Weckstein, *Limitations on the Right to Counsel: The Unauthorized Practice of Law*, 1978 Utah L.Rev. 649, 650.) As this court has recognized, there are proceedings in which nonattorneys "are competent" to represent others without undermining the protection of the public interest. (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 913-914, 160 Cal.Rptr. 124, 603 P.2d 41.)

The majority, too, purports to apply the definition of the practice of law as articulated in *Baron*, *supra*, 2 Cal.3d 535. The majority, however, focuses only on *Baron's* quotation of the general definition of the practice of law set forth in *Merchants*, *supra*, 189 Cal. 531, 535. The majority ignores both the ambiguity in the *Merchants* definition and the manner in which *Baron* resolved that ambiguity. The majority apparently views the practice of law as encompassing *any* "legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation." (Maj. opn., *ante*, 1998 Cal. LEXIS 2 at p. *11.)

The majority's overbroad definition would affect a host of common commercial activities. On point here are comments that Professor Deborah Rhode made in a 1981 article published in the Stanford Law Review: "For many individuals, most obviously accountants, bankers, real estate brokers, and insurance agents, it would be impossible to give intelligent counsel without reference to legal concerns that such statutes reserve as the exclusive province of lawyers. As one [American Bar Association] official active in unauthorized practice areas recently acknowledged, there is growing recognition that ' "all kinds of other professional people are practicing the law almost out of necessity." ' Moreover, since most legislation does not exempt gratuitous activity, much advice commonly imparted by friends, employers, political organizers, and newspaper commentators constitutes unauthorized practice. For example, although the organized bar has not yet evinced any inclination to drag [nationally syndicated advice columnist] Ann Landers through the courts, she is plainly fair game under extant statutes [proscribing the unauthorized practice of law]." (Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, *supra*, 34 Stan.L.Rev. at p. 47, fns. omitted.)

Unlike the majority, I would for the reasons given above adhere to the more narrowly drawn definition of the practice of law that this court articulated in *Baron*, *supra*, 2 Cal.3d 535, 543: the representation of another in a judicial proceeding or an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind. Applying that definition here, I conclude that the trial court should not

have granted summary adjudication for plaintiffs based on the Birbrower lawyers' California activities. That some or all of those activities related to arbitration does not necessarily establish that they constituted the practice of law, as I shall explain.

III

As I mentioned earlier, Birbrower's clients had a software development and marketing agreement with Tandem. The agreement provided that its validity, interpretation, and enforcement were to be governed by California law. It also contained an arbitration provision. After a dispute arose pertaining to Tandem's performance under the agreement, Birbrower initiated an arbitration on behalf of its clients by filing a claim with the American Arbitration Association in San Francisco, and held meetings in California to prepare for an arbitration hearing. Because the dispute with Tandem was settled, the arbitration hearing was never held.

As I explained in part II, *ante*, this court in *Baron*, *supra*, 2 Cal.3d 535, 543, defined the term "practice of law" in narrower terms than the court had done earlier in *Merchants*, *supra*, 189 Cal. 531, 535, which simply adopted verbatim the general definition set forth in an 1893 decision of the Indiana Court of Appeal. Under the narrower definition articulated in *Baron*, the practice of law is the representation of another in a judicial proceeding or an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind.

Representing another in an arbitration proceeding does not invariably present difficult or doubtful legal questions that require a trained legal mind for their resolution. Under California law, arbitrators are "not ordinarily constrained to decide according to the rule of law. . . . " (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11, 832 P.2d 899.) Thus, arbitrators, " 'unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action.' [Citations.]" (3 Cal. 4th at pp. 10-11.) They " 'are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good].' [Citation.]" (*Id.* at p. 11 brackets in original.) For this reason, "the existence of an *error of law* apparent on the face of the [arbitration] award *that causes substantial injustice* does not provide grounds for judicial review." (*Id.* at p. 33 italics added; contra, 3 Cal. 4th at pp. 33-40 (conc. and dis. opn. of Kennard, J.).)

Moreover, an arbitrator in California can award any remedy "arguably based" on "the contract's general subject matter, framework or intent." (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 381, 885 P.2d 994.) This means that "an arbitrator in a commercial contract dispute may award an essentially unlimited range of remedies, whether or not a court could award them if it decided the same dispute, so long as it can be said that the relief draws its 'essence' from the contract and not some other source." (*Id.* at p. 391 (dis. opn. of Kennard, J.).)

To summarize, under this court's decisions, arbitration proceedings are not governed or constrained by the rule of law; therefore, representation of another in an arbitration proceeding, including the activities necessary to prepare for the arbitration hearing, does not necessarily require a trained legal mind.

Commonly used arbitration rules further demonstrate that legal training is not essential to represent another in an arbitration proceeding. Here, for example, Birbrower's clients agreed to resolve any dispute arising under their contract with Tandem using the American Arbitration Association's rules, which allow any party to be "represented by counsel *or other authorized representative.*" (Am. Arbitration Assn., Com. Arbitration Rules (July 1, 1996) § 22, italics added.) Rules of other arbitration organizations also allow for representation by nonattorneys. For instance, the Rules of Procedure of the Inter-American Commercial Arbitration Commission, article IV provides: "The parties may be represented or assisted by persons of their choice." By federal law, this rule applies in all arbitrations between a United States citizen and a citizen of another signatory to the Inter-American Convention on International Commercial Arbitration, unless the arbitrating parties have expressly provided otherwise. (9 U.S.C. § 303(b); Inter-Am. Convention on International Com. Arbitration, art. 3.)

The American Arbitration Association and other major arbitration associations thus recognize that nonattorneys are often better suited than attorneys to represent parties in arbitration. The history of arbitration also reflects this reality, for in its beginnings arbitration was a dispute-resolution mechanism principally used in a few

specific trades (such as construction, textiles, ship chartering, and international sales of goods) to resolve disputes among businesses that turned on factual issues uniquely within the expertise of members of the trade. In fact, "rules of a few trade associations forbid representation by counsel in arbitration proceedings, because of their belief that it would complicate what might otherwise be simple proceedings." (Grenig, Alternative Dispute Resolution (1997) § 5.2, p. 81.) The majority gives no adequate justification for its decision to deprive parties of their freedom of contract and to make it a crime for anyone but California lawyers to represent others in arbitrations in California.

In addressing an issue similar to that presented here, a federal court held that a firm of New Jersey lawyers not licensed to practice law in New York was entitled to recover payment for legal services rendered in a New York arbitration proceeding. (*Williamson v. John D. Quinn Const. Corp.* (S.D.N.Y. 1982) 537 F.Supp. 613 (*Williamson*).) In allowing recovery of fees, the court cited a report by the Association of the Bar of The City of New York: "The report states, 'it should be noted that no support has to date been found in judicial decision, statute or ethical code for the proposition that representation of a party in any kind of arbitration amounts to the practice of law.' The report concludes 'the Committee is of the opinion that representation of a party in an arbitration proceeding by a nonlawyer or a lawyer from another jurisdiction is not the unauthorized practice of law.' " (*Id.* at p. 616, quoting Com. Rep., Labor Arbitration and the Unauthorized Practice of Law (May/June 1975) 30 Record

of the Association of the Bar of The City of New York, No. 5/6.)

The majority's attempt to distinguish *Williamson, supra,* 537 F.Supp. 613 from this case is unpersuasive. The majority points out that in *Williamson,* the lawyers of the New Jersey firm actually rendered services at the New York arbitration hearing, whereas here the New York lawyers never actually appeared at an arbitration hearing in California. (Maj. opn., *ante,* at pp. 19, 20, fn. 4.) The majority distinguishes *Williamson* on the ground that in this case no arbitration hearing occurred. Does the majority mean that an actual appearance at an arbitration hearing is not the practice of law, but that preparation for arbitration proceedings is?

In this case, plaintiffs have not identified any specific California activities by the New York lawyers of the Birbrower firm that meet the narrow definition of the term "practice of law" as articulated by this court in *Baron, supra,* 2 Cal. 3d 535, 543. Accordingly, I would reverse the judgment of the Court of Appeal and direct it to remand the matter to the trial court with directions to vacate its order granting plaintiff's motion for summary adjudication and to enter a new order denying that motion.

KENNARD, J.

Cite as 98 C.D.O.S. 1376

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., et al., Petitioners,

v.

THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent;

ESQ BUSINESS SERVICES, INC., Real Party in Interest.

No S057125
In the Supreme Court of California
CT. App. 6 H014880
Santa Clara County Super. Ct. No. CV737595
Filed February 25, 1998

ORDER MODIFYING OPINION (NO CHANGE IN JUDGMENT)

BY THE COURT:

The opinion herein appearing at 17 Cal.4th 119 is modified as follows:

Add the following language after the first sentence and citation on page 131: "Likewise, the Act does not apply to the preparation of or participation in labor negotiations and arbitrations arising under collective bargaining agreements in industries subject to federal law. (See, e.g., *Teamsters Local v. Lucas Flour Co.* (1962) 369 U.S. 95, 103; *see also* Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a).)"

This modification does not affect the judgment.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

March 5, 1998

Mr. David W. Mitchell
Hoge, Fenton, Jones & Appel
Sixty South Market Street
San Jose, CA 95113-2396

Re: ESQ Business Services, Inc., et al.
v. Birbrower, Montalbano, Condon &
Frank, P.C., et al.
Application No. A-660

Dear Mr. Mitchell:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on March 5, 1998, extended the time to and including May 5, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Jeffrey D. Atkins
Jeffrey D. Atkins
Assistant Clerk

BIRBROWER, MONTALBANO, CONDON & FRANK, et al., Petitioners, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; ESQ BUSINESS SERVICES, INC., Real Party in Interest.

No. H014880

COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

49 Cal. App. 4th 801; 1996 Cal. App. LEXIS 908; 56 Cal. Rptr. 2d 857; 96 Cal. Daily Op. Service 7212; 96 Daily Journal DAR 11761

September 25, 1996, Filed

SUBSEQUENT HISTORY: Review Granted January 15, 1997 (S057125); Reported at: 1997 Cal. LEXIS 44. (See 17 Cal. 4th 119).

PRIOR HISTORY: Superior Court of Santa Clara County. Super. Ct. No. CV737595. Hon. John F. Herlihy, Judge.

DISPOSITION: Petition for writ of mandate denied.

COUNSEL: William J. Elfving; Hoge, Fenton, Jones & Appel, for Petitioner.

No Appearance for Respondent.

Robert W. Ricketson; Hopkins & Carley, for Real Party in Interest.

JUDGES: COTTLE, P.J.; BAMATTRE-MANOUKIAN, J., and MIHARA, J., concurring.

OPINION BY: COTTLE

OPINION:

COTTLE, P.J.:

ESQ Business Services, Inc. (ESQ), a California corporation, brought an action against the New York law firm of Birbrower, Montalbano, Condon & Frank, P.C. (the Birbrower firm), for legal malpractice. The Birbrower firm removed the case to federal court and there filed a counterclaim, California's equivalent of a cross-complaint, seeking its attorney fees under an attorney fee agreement entered into in New York. After the case was remanded to the state court, ESQ brought a motion for summary judgment or summary adjudication of issues on those causes of action in its complaint and in the Birbrower firm's counterclaim regarding the validity of the attorney fee agreements. The trial court granted ESQ's motion for summary adjudication of issues, determining that the attorney fee agreements were unenforceable because the Birbrower firm had engaged in the unauthorized practice of law in California.

The Birbrower firm petitioned this court, pursuant to Code of Civil Procedure section 437c, subdivision (1), for a writ of mandate directing the trial court to vacate its summary adjudication order. We stayed the trial court proceedings and issued an alternative writ to permit further consideration of the issues raised in the petition, i.e., whether out-of-state attorneys who perform legal services in California, but are not licensed to practice in California, can enforce attorney fee agreements that include the California services. As will appear, we conclude that they may not. Accordingly, we shall deny the Birbrower firm's petition for writ of mandate.

FACTS

With respect to the unauthorized practice of law issue,[1] ESQ set forth the following facts, which the Birbrower firm agreed were undisputed: "Defendant Birbrower, Montalbano, Condon & Frank, P. C., is a professional law corporation incorporated in the State of New York with its principal place of business in New City, New York. [P] 2. Defendant Kevin Hobbs ('Hobbs') is an attorney employed by the Birbrower firm. [P] 3. Defendant Thomas A. Condon ('Condon') is an attorney employed by the Birbrower firm. [P] 4. Hobbs has never been licensed to practice law in California. [P] 5. Condon has never been licensed to practice law in California. [P] 6. No attorney affiliated with the Birbrower [firm] during 1990-1993 was licensed to practice law in California. [P] 7. ESQ Business Services, Inc. ('ESQ'), was and is a California corporation with its principal place of business in Santa Clara County California. [P] 8. In or about July 1992, ESQ and the Birbrower firm entered into a 'Retainer Agreement' whereby the Birbrower firm agreed to provide certain legal services to ESQ. [P] 9. The Retainer Agreement called for the Birbrower firm to provide legal services including 'All matters pertaining to the investigation of and prosecution of all claims and causes of

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[1] ESQ's separate statement of undisputed facts also set forth facts relating to the content and validity of the attorney fee agreements. The Birbrower firm agreed that these facts were also undisputed. We do not set them forth here, however, because the court granted ESQ's motion solely on the basis of its first argument: that the fees were unenforceable because the Birbrower firm had engaged in the unauthorized practice of law.

action against Tandem Computers Incorporated. . . . ' [P] 10. The 'claims and causes of action against Tandem' related to a contract entitled 'Software Development and Marketing Agreement' dated March 16, 1990 (the 'Tandem Agreement'). [P] 11. Tandem Computers, Incorporated ('Tandem') was and is a Delaware corporation with its principal place of business in Santa Clara County California. [P] 12. The Tandem Agreement provided that it was to be governed by and interpreted under California law. [P] 13. In the course of representing ESQ against Tandem pursuant to the Retainer Agreement, the Birbrower firm, through Hobbs and/or Condon, did all of the following: [P] a. The Birbrower firm filed a demand for arbitration on behalf of ESQ against Tandem with the San Francisco, California offices of The American Arbitration Association. [P] b. In or about August 1992, Hobbs and Condon traveled to California for a series of meetings with ESQ, ESQ's accountants, and Tandem's representatives. [P] c. During the course of the August 1992 meetings in California, Hobbs and/or Condon discussed with ESQ and ESQ's accountants various matters regarding the substance of the Tandem dispute and strategy for resolving the dispute. [P] d. During the course of the August 1992 meetings in California, Hobbs and/or Condon made recommendations and gave advice concerning strategy for resolving the Tandem dispute. [P] e. During the course of the August 1992 meetings in California Hobbs and Condon met with Tandem representatives four or five times over a two-day period. [P] f. During the course of the August 1992 meetings in California with Tandem representatives, Hobbs and Condon spoke on ESQ's behalf, setting forth ESQ's positions. [P] g. During

the course of the August 1992 meetings in California with Tandem's representatives, Hobbs made a demand for payment by Tandem to ESQ in the amount of $15 million and Condon communicated to Tandem his belief that if the matter were litigated, damages could exceed $15 million. [P] h. In or about March or April of 1993, Hobbs, Condon, and one other Birbrower firm attorney visited California for the purpose of interviewing potential arbitrators and meeting with ESQ and its accountants. [P] i. During the March or April 1993 trip to California, Hobbs met with ESQ and discussed, among other things, various business plans of ESQ and the potential impact of those plans on the dispute with Tandem. [P] j. On or about August 30, 1993, Hobbs traveled to California for the stated purpose of assisting ESQ in reaching a settlement agreement with Tandem. [P] k. On or about August 30, 1993, and August 31, 1993, while in California, Hobbs met with ESQ and ESQ's accountants to discuss the proposed settlement agreement, met with Tandem's representatives to propose and discuss changes to the proposed settlement agreement, and reviewed and commented on multiple revised drafts of the proposed settlement agreement. [P] l. While in California, on or about August 30 and 31, 1993, Hobbs gave ESQ legal advice, including, but not limited to, an opinion that ESQ should not settle the dispute with Tandem on the terms proposed. [P] 14. At no point in the course of the representation under the Retainer Agreement did the Birbrower firm retain or associate any co-counsel."

The Birbrower firm set forth the following additional relevant facts, which it contended were also undisputed: that ESQ knew petitioner was not licensed to practice law

in California and that the original retainer agreement was executed in New York.

Based on these undisputed facts, the trial court found that (1) the Birbrower firm was "not admitted to the practice of law in California," (2) the Birbrower firm "did not associate California counsel," (3) the Birbrower firm "provided legal services in this state," and (4) "the law is clear that no one may recover compensation for services as an attorney in this state unless he or she was a member of the state bar at the time the services were performed." Consequently, the court determined that ESQ was entitled to summary adjudication of the first through fourth causes of action in the Birbrower firm's " 'counterclaim' " and of the third and fourth causes of action of its second amended complaint, because the underlying attorney fee agreements were unenforceable.[2]

At the hearing on the motion, the court also noted: "It seems to me that those are some of the issues that this Court has to struggle with, and then it becomes a question of if they aren't allowed to collect their attorney's fees here, I don't think that puts the attorneys in a position from being precluded from collecting all of their

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[2] Granting summary adjudication on these issues left the following to be decided at trial: (1) ESQ's malpractice action against the Birbrower firm, and (2) the fifth through seventh causes of action in the Birbrower firm's counterclaim. The fifth cause of action was for quantum meruit (the reasonable value of legal services provided), the sixth was for damages based on fraud and deceit, and the seventh was for damages for negligent misrepresentation.

attorney's fees, only those fees probably that were generated by virtue of work that they performed in California and not that work that was performed in New York."

The Birbrower firm petitioned this court for a writ of mandamus directing the trial court to vacate its summary adjudication order. ESQ concurred with the Birbrower firm that immediate appellate review of this petition was appropriate; however, it urged this court to deny the writ application on the merits. We issued an alternative writ and requested additional briefing from both petitioner and real party in interest, ESQ. We have considered their briefs and now conclude that the trial court's order was proper, for the reasons stated by the trial court. Accordingly, we shall deny the Birbrower firm's petition.

DISCUSSION

Business and Professions Code section 6125[3] states that "no person shall practice law in California unless the person is an active member of the State Bar." No one in the Birbrower firm was an active member of the State Bar of California or associated with counsel who was. Thus, if the Birbrower firm "practiced law in California," it did so in violation of section 6125. This petition raises two questions: (1) whether the Birbrower firm's activities in California constituted the practice of law, and (2) if so, whether the violation renders the attorney fee agreement unenforceable.

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[3] All further statutory references are to the Business and Professions Code unless otherwise specified.

Although the term "practice of law" is not defined by statute, "the cases on illegal practice have given it a most comprehensive meaning." (1 Witkin, Cal. Procedure (3d ed. 1985) Attorneys, § 295, p. 331.) "While courts have experienced difficulty in formulating a precise and all-embracing definition as to what constitutes the practice of law, the one generally accepted is that announced in *Eley v. Miller, 7 Ind.App. 529, 535 [34 N.E. 836, 837]*, and adopted by our Supreme Court in *People v. Merchants' Protective Corp. (1922) 189 Cal. 531, 535 [209 P. 363, 365]*, as follows: 'as the term is generally understood, the practice of law is the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be [ ] pending in court.' (Emphasis added.) [Citations.]" (*Agran v. Shapiro (1954) 127 Cal.App.2d Supp. 807, 812, 273 P.2d 619*; accord, *Mickel v. Murphy (1957) 147 Cal.App.2d 718, 721, 305 P.2d 993; People v. Sipper (1943) 61 Cal.App.2d Supp. 844, 846, 142 P.2d 960*, overruled on another ground in *Murgia v. Municipal Court (1975) 15 Cal.3d 286, 301, 124 Cal.Rptr. 204, 540 P.2d 44; People v. Ring (1937) 26 Cal.App.2d Supp. 768, 771, 70 P.2d 281; People v. California Protective Corp. (1926) 76 Cal.App. 354, 359, 244 P. 1089; Smallberg v. The State Bar (1931) 212 Cal. 113, 119, 297 P. 916.*)

Even a single incident of giving of legal advice for a fee constitutes the practice of law within the meaning of section 6125. (*People v. Sipper, supra, 61 Cal.App.2d Supp. at p. 846; People v. Ring, supra, 26 Cal.App.2d Supp. at p. 771.*)

Additionally, it is not necessary that the matter with respect to which the advice was given be pending before a state court. (*Mickel v. Murphy, supra, 147 Cal.App.2d at p. 722; State Bar of California v. Superior Court (1929) 207 Cal. 323, 278 P. 432; People v. Sipper, supra, 61 Cal.App.2d Supp. at p. 846; Cohn v. Thompson (1932) 128 Cal.App.Supp. 783, 788, 16 P.2d 364.*)

In the course of representing ESQ against Tandem pursuant to the retainer agreement, the Birbrower firm engaged in numerous activities in California. These activities are set forth in detail in this opinion's statement of facts at pages 2-5 (undisputed facts 13(a) through 13 (l)) and will not be repeated here. Suffice it to say, these activities clearly constitute the "practice of law" as defined by the above cited California cases. The Birbrower firm gave legal advice and counsel to ESQ in California, it made settlement demands to Tandem on ESQ's behalf, it assisted in negotiating and drafting a settlement agreement, and it filed a demand for arbitration. Under California cases defining the practice of law, the Birbrower firm's in-state activities clearly constituted the practice of law.

Since the Birbrower firm practiced law in California without being licensed to practice in this state, it violated the proscription against unauthorized practice contained in section 6125. We now turn to the second question raised in this writ petition: does the firm's violation of section 6125 make the attorney fee agreement unenforceable?

To answer this question, both the Birbrower firm and ESQ rely on an ALR annotation entitled "Right of Attorney Admitted in One State to Recover Compensation for Services Rendered in Another State Where he was not Admitted to the Bar." (*11 A.L.R.3d 907.*) The annotation states the general rule that "an attorney who is not admitted to practice in the state where he performs services is not entitled to recover compensation for such services even though he is admitted to practice in another state." (11 A.L.R.3d, § 3 [a], p. 908.) It also lists exceptions to the general rule. It is these that the Birbrower firm calls to our attention.

The first exception concerns practice in federal courts. (11 A.L.R.3d, § 5, pp. 912-913.) Several cases, including two in California, have allowed attorneys to recover their fees where the services rendered involved practice before federal courts, reasoning that states have no jurisdiction to purport to regulate practice before the federal courts. (See e.g., *Cowen v. Calabrese (1964) 230 Cal.App.2d 870, 41 Cal.Rptr. 441; In re McCue (1930) 211 Cal. 57, 293 P. 47; Spanos v. Skouras Theatres Corporation (S.D.N.Y. 1964) 235 F.Supp. 1.*) The Birbrower firm contends that because the ESQ-Tandem dispute was going to be arbitrated before the American Arbitration Association, this was akin to practice before the federal courts. We disagree. None of the supremacy issues applicable if a state were to attempt to regulate an attorney's practice in federal courts would apply in the situation where litigants have chosen an alternative forum to resolve their disputes.

The second exception is labeled "services not involving courtroom appearance." (11 A.L.R.3d, § 4, p. 911.) It

states that a few courts have allowed attorneys to recover fees where the services they rendered in the local jurisdiction did not involve courtroom appearances or other actual litigation before the state courts. The annotation lists two cases applying this exception, and the pocket part lists a third. In the first, a 1912 case, a New Jersey attorney successfully sued his client in New Jersey for services he provided in a corporate reorganization, even though some of the services were rendered in North Carolina, where he was not licensed. (*Wescott v. Baker (1912) 83 N.J.L. 460, 85 A. 315.*) This case is distinguishable; for this case to be analogous, the Birbrower firm would have had to sue ESQ in New York for legal services rendered. In any event, California cases have consistently held that it is not necessary that a matter be pending in state court. The critical inquiry is whether the unlicensed person rendered legal advice and counsel or prepared legal instruments or contracts by which legal rights were secured. (*Mickel v. Murphy, supra, 147 Cal.App.2d at p. 722; State Bar of California v. Superior Court, supra, 207 Cal. 323; People v. Sipper, supra, 61 Cal. App. 2d Supp. at p. 846; Cohn v. Thompson, supra, 128 Cal. App. Supp. at p. 788.*) The other two cases employing this exception were *Spanos v. Skouras Theatres Corporation, supra, 235 F. Supp. 1,* cited in the previous paragraph for also applying the "practice in federal courts" exception, and *Dietrich Corp. v. King Resources Co. (10th Cir. 1979) 596 F.2d 422.* In both of those cases, however, the out-of-state attorney worked with local attorneys. Clearly if the Birbrower firm had associated with locally licensed attorneys, its fees would have been recoverable. All the

remaining cases cited in the annotation rejected this exception, as do we.

A third exception has been made in a "few cases" where the attorney "makes a full disclosure to his client of his lack of local license and does not conceal or misrepresent the true facts." (11 A.L.R.3d, § 3[b], p. 910.) One of the three cases cited is *Spanos v. Skouras Theatres Corporation, supra, 235 F. Supp. 1,* which also employed the first two exceptions, including the exception for practice before the federal courts that is recognized in California. The second case, from 1845, allowed a New Hampshire attorney to recover for services rendered in Massachusetts after May 1, 1836, when a revised statute went into effect containing no express prohibition of recovery by an unlicensed attorney. (*Ames v. Gilman (1845) 51 Mass. 239.*) California, in contrast, has a statute, section 6125, which prohibits practice within the state by anyone, including lawyers licensed in other states, who are not members of the California State Bar. The third case, *Freeling v. Tucker (1930) 49 Idaho 475, 289 P. 85,* allowed an Oklahoma attorney to recover for services rendered in an Idaho probate court. The court presumed in favor of the attorney that the court in which he had tried the case had extended to him the right to appear as a matter of comity.

There are no California cases that have applied the "full disclosure" exception, and we reject it. The exception does not further the important state interest in regulating attorneys who practice law in this state. An out-of-state lawyer has not established that he or she is familiar with this state's laws and procedures. Nor is an out-of-state lawyer subject to the disciplinary controls that the State Bar maintains over its members. Additionally, an

out-of-state lawyer has not demonstrated his or her competence before the bar of this state. It is not in California's best interest to have its citizens subject to the risk of placing their legal affairs into the hands of a person who has not satisfied the requirements for admission to the State Bar and who has not associated with local counsel.

The last exception upon which the Birbrower firm relies is in cases requiring "interstate representation." (11 A.L.R.3d, § 6, p. 913.) This exception is inapplicable under the facts presented here, however. The underlying dispute was between Tandem, based in California, and ESQ, also based in California. ESQ alleged that Tandem violated the Software Development and Marketing Agreement that the parties entered into in California in March 1990. That agreement specified that "[t]he internal laws of the State of California (irrespective of its choice of law principles) shall govern the validity of this Agreement, the construction of its terms, and the interpretation and enforcement of the rights and duties of the parties hereto." Nothing about this dispute was interstate in nature. Consequently, the exception does not apply.

Since none of the exceptions apply, the Birbrower firm is subject to the general rule enunciated in the annotation: an out-of-state attorney who renders services locally is not entitled to recover fees for the local services. As the court stated in *Hardy v. San Fernando Valley C. of C. (1950) 99 Cal. App. 2d 572, 222 P.2d 314*, "It is unlawful for a person not an active member of The State Bar to practice law in this state. (. . . § 6125.) Practicing without being a member is a misdemeanor. (. . . § 6126.) No one may recover compensation for services as an attorney at law in this state unless he was at the time the services

were performed a member of The State Bar. (See 7 C.J.S. 1022, § 165 and cases cited; 5 Am.Jur. 353, § 156 and cases cited; Anno. *118 A.L.R. 652.*)" (*Id.*, at pp. 576-577.) The Birbrower firm attempts to distinguish the facts in this case from the facts in Hardy. However, it is not the facts in Hardy that dictate its result. Whether a person may recover compensation for services as an attorney at law requires first and foremost that the person be a member of the State Bar when the services were rendered. Only if that prerequisite is met do other facts become relevant.

In the instant case, the court has allowed the Birbrower firm to pursue its claim for quantum meruit. In addition, the court has indicated it sees no impediment in the Birbrower firm recovering the reasonable value of the services rendered in New York. However, the attorney fee agreement is void and unenforceable for the reason that it includes payment for services rendered in California, to a California client, in a California dispute, between California parties, over a contract entered into in California, which was to be governed by California law. When New York counsel decided to accept this representation, it should have researched California law, including the law governing the practice of law in this state. It never associated with California counsel, yet it engaged in numerous acts in California that constituted the unauthorized practice of law in this state. We conclude that the trial court correctly granted ESQ's motion for summary adjudication of issues.

DISPOSITION

The petition for writ of mandate is denied.

BAMATTRE-MANOUKIAN, J., and MIHARA, J., concurring.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

ESQ BUSINESS SERVICES, INC., a California corporation, et al., Plaintiffs, v. BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., a New York corporation, et al., Defendants.	No. CV737595 **ORDER** (Filed Jan. 8, 1996)
AND RELATED CROSS-ACTION.	

The motion of plaintiffs and cross-defendants (collectively "ESQ") for summary judgment and/or summary adjudication came on regularly for hearing on December 14, 1995, in Department 12 of the above-entitled court, the Honorable John F. Herlihy presiding. Hopkins & Carley, A Law Corporation, by Robert W. Ricketson, appeared as attorneys for ESQ. Hoge, Fenton, Jones & Appel, Inc., by William J. Elfving, appeared as attorneys for defendants and cross-complainants (collectively "Birbrower").

The court declines to render formal rulings on the evidentiary objections, but has disregarded all inadmissible and incompetent evidence in ruling. *Biljac Assoc. v. First Interstate Bank of Oregon* (1990) 218 Cal. App. 3d 1410, 1419-1420.

After full consideration of the evidence, memoranda of points and authorities, and separate statements submitted by the parties, and oral arguments of counsel, the court finds that each and every fact set forth in ESQ's separate statement of facts is undisputed as shown by the evidence cited therein and as shown by Birbrower's response thereto, which response states that each of the facts set forth in ESQ's separate statement is undisputed. More specifically:

(a) It is undisputed that Birbrower and the attorneys associated with the Birbrower firm, were not admitted to the practice of law in California. (ESQ's separate statement Nos. 4, 5, 6.) It is undisputed that Birbrower did not associate California counsel in connection with the representation of ESQ. (ESQ's separate statement No. 14.)

(b) It is undisputed that Birbrower provided legal services in this state. (ESQ's separate statement No. 13.) (*People v. Landlords Professional Services* (1989) 215 Cal. App. 3d 1599, 1604.)

(c) The law is clear that no one may recover compensation for services as an attorney in this state unless he or she was a member of the state bar at the time those services were performed. (*Hardy v. San Fernando Valley Chamber of Commerce* (1950) 99 Cal. App. 2d 572, 576.)

ESQ has therefore met its initial burden of showing that: (1) it has a complete defense as to the First through Fourth Causes of Action (entitled "claims for relief") of the cross-complaint (entitled "counterclaim"); and (2), as to the complaint, both the "Retainer Agreement," a copy of which is attached as Exhibit A to the cross-complaint,

and the untitled document a copy of which is attached as Exhibit B to the cross-complaint, are unenforceable. (CCP §§ 437c(o)(2), 437c(n)(1).)

Birbrower has not come forward with admissible evidence showing the existence of a triable issue of material fact with regard to the above.

As a result, ESQ is entitled to summary adjudication. CCP § 437c(f)(1). ESQ's motion for summary adjudication of the First, Second, Third and Fourth Causes of Action of Birbrower's cross-complaint is granted. ESQ's motion for summary adjudication of the Third and Fourth Causes of action of the second Amended Complaint is granted.

Having found summary adjudication of these matters proper on the grounds described above, the court declines to reach the two alternative grounds set forth in ESQ's motion.

IT IS THEREFORE ORDERED that the motion for summary adjudication is GRANTED in the particulars described above, and that the final judgment in this action shall, in addition to any other matters determined at trial, order judgment in accordance with the matters adjudicated herein.

DATED: 1/8/96

/s/ JOHN F. HERLIHY
JOHN F. HERLIHY
JUDGE OF THE
SUPERIOR COURT

APPROVED AS TO FORM:

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March 3, 1998

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The Honorable Ronald M. George, Chief Justice
of the Supreme Court of California
The Associate Justices of the Supreme Court
of California
303 Second Street, South Tower, 9th Floor
San Francisco, CA 94107

Re: *Birbrower, Montalbano, Condon & Frank, P.C. v. The Superior Court of Santa Clara County*, 17 Cal. 4th 119

Dear Chief Justice George and Associate Justices:

We have read with interest and applaud your order, filed February 25, 1998, modifying your opinion in the above case to indicate that Business & Professions Code § 6125 does not apply to the preparation of or participation in labor negotiations and arbitrations arising under collective bargaining agreements in industries subject to Federal law.

The *Birbrower* opinion has been a subject of wide interest among lawyers not only in California, but elsewhere in the country, and has been a source of concern

and confusion as to its implications for multi-state practice of law. We believe it important that the Court take the opportunity now to recognize what are several obvious exceptions to Business & Professions Code § 6125 that are not currently recognized in the opinion, even as modified. This is particularly important in view of the Court's statement (17 Cal. 4th at 129) that "Exceptions to Section 6125 do exist, but are generally limited to allowing out-of-state attorneys to make brief appearances before a state court or tribunal. They are narrowly drawn and strictly interpreted."

Among the circumstances where the Court, in the interest of clarity, could make clear that § 6125, properly construed, does not raise issues of unauthorized practice of law, are the following:

(1) Business & Professions Code § 6125 does not apply to practice before many Federal administrative agencies. See *Sperry v. Florida ex rel Florida Bar,* 373 US 379 (1963) (Patent & Trademark Office); *Keller v. Wisconsin ex rel State Bar of Wisconsin,* 374 US 102 (1963) (Interstate Commerce Commission), 5 USC § 500(b).

(2) Business & Professions Code § 6125 does not apply to practice before many state administrative agencies. See, e.g., 80 Ops. Cal. Atty. Gen. 221 (1997); *Welfare Rights Org. v. Crisan,* 33 Cal. 3d 766 (1993); *Staley v. California Unemp. Ins. App. Bd.,* 6 Cal. App. 3d 675 (1970); 18 Cal. Code of Regs. § 5073 (State Board of Equalization); Cal. Revenue & Taxation Code § 21011(c) Franchise Tax Board).

(3) Business & Professions Code § 6125 does not apply in the case of an attorney licensed in another

jurisdiction who is supervised by an attorney licensed in California. See *Estate of Condon v. McHenry*, 55 Cal. App. 4th 1456, 1462 n.6 (1997); in this connection, compare California Supreme Court Rule 983.2 dealing with certified law students, which permits law students certified by the State Bar who have completed one year of study at an accredited law school to engage in certain permitted activities with appropriate supervision, including negotiations for a client, giving legal advice to a client, and appearances on behalf of a client (subject to direct supervision) in depositions and other proceedings. We believe Rule 983.2 could apply by analogy to the concept of supervision by California practitioners of experienced attorneys licensed in other jurisdictions.

(4) Business & Professions Code § 6125 should not apply where services are rendered only to an attorney licensed in California (including in-house counsel for a client) and not directly to a non-attorney client. See *The Dietrich Corporation v. King Resources Company*, 596 F.2d 422, 426 (10th Cir. 1979).

(5) The California legislature has made clear that there is an exception from Business & Professions Code § 6125 for lawyers not licensed in California who are in this state only temporarily and who practice as limited liability partnerships or professional corporations. A law firm that operates as a foreign limited liability partnership is required to register under § 16959(a) of the California Corporations Code only if it is transacting intrastate business in California. Section 16959(n)(9) provides that such a partnership shall not be considered to be transacting intrastate business solely by reason of conducting an isolated transaction that is completed

within 180 days and not in the course of a number of repeated transactions of like nature. Similarly, § 13405(a) of the California Corporations Code provides that nothing in that section is intended to prohibit the rendition of occasional professional services in California as an incident to a professional employee's primary practice for a foreign professional corporation qualified to render professional services in California, so long as it is permitted by the governing agency that regulates the particular profession in California. A similar exception should be permitted for a multi-state law firm with California offices whose non-California attorneys are in California only temporarily.

(6) Business & Professions Code § 6125 should not apply where an attorney not licensed in California is rendering services to a client not located in California, and in the course of rendering the services has occasion to act on behalf of the client in California where no court appearance in California is required. This view has been articulated in the most recent draft of the American Law Institute's Restatement of the Law Governing Lawyers, § 3 and comment *e* to § 3, and has been approved by the ALI Council (see Council Draft No. 13, October 8, 1997), and is being submitted to the ALI membership for consideration at its Annual Meeting in May 1998.

In addition to the foregoing exceptions, we should note that the modification to the *Birbrower* opinion filed on February 25, 1998, itself raises a question as to whether the Court intended to construe § 6125 as not applying to any matter where a uniform rule under a Federal statute or regulation is important, so that the reference to collective bargaining was simply illustrative,

or whether the Court intended to limit the modification only to issues arising under the Labor-Management Relations Act of 1947, and if so, why?

The subject of multi-state practice of law is of great significance to the legal profession nationwide. We respectfully suggest that it deserves a fuller briefing for the Court's consideration, and we therefore request that the Court defer remanding the *Birbrower* case until such a briefing can be submitted. We as a Firm are prepared to file promptly an amicus brief in support of the views expressed in this letter, and request that the Court permit time for such a brief to be submitted.

Respectfully submitted,

/s/ Marshall L. Small
Marshall L. Small
General Counsel to the Firm

California Dispute Resolution Council

promoting effective, accessible conflict resolution services statewide

(Board of Directors Omitted in Printing)

February 3, 1998

Honorable Chief Justice of the Supreme Court
Ronald George and the Associate Justices
303 Second Street, South Tower
San Francisco, CA 94107

Re: *Birbrower, Montalbano, Condon & Frank v. Superior Court No. S057125 (January 5, 1998)*

Dear Chief Justice George and Associate Justices Chin, Mosk, Baxter, Werdegar, Brown and Kennard:

I write on behalf of the California Dispute Resolution Council (CDRC), whose membership includes leaders from all the major dispute resolution organizations in California, all sectors of practice and all types of organizational affiliations. Among CDRC's individual members are prominent practitioners (both paid and volunteer service providers), directors and staff from a wide variety of practice organizations (both for-profit and non-profit), retired judges, trainers, and leading academicians.

We are concerned that this decision may have an unintended effect on arbitration, both in private contractual arbitrations and public sector collective bargaining arbitrations. Since *Birbrower* sometimes uses the term "private arbitration" (1998 LEXIS 2, 26) and sometimes refers only to "arbitration" (1998 LEXIS 2, fn4, 26) it may be thought to reach arbitration under public sector collective bargaining agreements. If so, it has the potential for great disruption of labor-management relations.

In my experience (which is confirmed by other CDRC members with similar practices) in approximately one-half the public sector arbitrations one or both sides are represented by non-lawyers. Typically, a county will be represented by its labor relations director and the union will be represented by a business representative, or a school district will be represented by the Assistant Superintendent for Personnel while the teacher union will be represented by a field representative. Similarly, in private contractual arbitration the parties have traditionally had the right to be represented by a non-lawyer. This right is often exercised in cases where one of the parties is a consumer.

The main reason for non-lawyer representatives is simple: if lawyers were required to prepare and present the case, the transaction costs for resolving the dispute would frequently exceed the amount in dispute. The parties choose arbitration because it is a fast and economical way of resolving work place disputes that might otherwise impair productivity or result in labor-management strife. If public sector entities and unions were required to use lawyers to prepare and present their arbitrations, they would be deprived of the means for resolving these disputes.

It is our understanding that the Court's decision will not become final until 30 days after it was filed and that the Court may on its own motion rehear it during that time. We do not believe that a formal re-hearing is necessary. Rather, we believe that the Court could simply clarify that neither "private arbitration" nor "arbitration" as it is

used in *Birbrower* is intended to cover public sector collective bargaining arbitration. As to private contractual arbitration, we respect the Court's determination of the appropriate forum for addressing our concerns.

Respectfully submitted,

/s/ Norman Brand
Norman Brand
President

Nancy K. Undem
Attorney At Law

February 27, 1998

Honorable Chief Justice of the Supreme Court
Ronald George and the Associate Justices
303 Second Street, South Tower
San Francisco, CA 94107

Re: *Birbrower, Montalbano, Condon & Frank v. Superior Court NO. SO57125 (January 5, 1998/Modified February 25, 1998)*

Dear Chief Justice George and Associate Justices Chin, Mosk, Baxter, Werdegar, Brown and Kennard:

I represent consumer/claimants in private contractual arbitrations before various stock, options and commodity exchanges, including the National Association of Securities Dealers, Inc. I also represent a non-attorney securities consumer advocates organization who also represents consumers in arbitrations before these exchanges.

These arbitration forums are self-regulated and arbitrations are conducted in accordance with the rules and regulations of the self-regulatory organization (SRO). These self-regulatory organizations (SRO's) have been empowered by the Securities and Exchange Commission (SEC) who, in turn, has been granted powers by Congress to regulate and establish rules for the SRO's.

The rules of these SRO's – the National Association of Securities Dealers (NASD), the American Stock Exchange (Amex), Boston Stock Exchange (BSE), Chicago Board Options Exchange (CBOE), Chicago Stock Exchange (CSE), New York Exchange (NYSE), Pacific Stock

Exchange (PSE), and the Philadelphia Stock Exchange (PhSE) – allow for representation of consumer/claimants by non-attorneys and attorneys licensed in other states. This court's ruling in *Birbrower* defines representation to be only by an attorney licensed in the State of California. The purpose for allowance of non-attorney and unlicensed attorney representation pursuant to the SRO rules was to enable consumers to have equal representation in arbitration.

We have read, with great concern, this court's decision on January 8, 1998, and applaud this court's Modification issued February 5, 1998 carving out an exception for "preparation of and participation in labor negotiations and arbitrations arising under collective bargaining agreements." However, this court did not say on what basis it was modifying its decision in *Birbrower.* We assume that this modification is based upon public policy grounds because of the large impact the decision would have on consumer/employees if their existing arbitration scheme is disrupted.

Identically, we urge the court to expand its modification to allow for non-attorney or non-licensed attorney representation before SRO's on the same basis and because arbitration under the rules of the SRO's are based on consumer agreements involving securities purchases which involve interstate commerce.

Finally, I would also like to call to the Court's attention the United States Supreme Court's decision to *Mastrobuno v. Shearson Lehman Hutton, Inc.,* 115 S.Ct. 1212 (1995) wherein the Court upheld an NASD arbitration award of punitive damages pursuant to provisions in the NASD's

Arbitrator's Manual, preempting New York State's Garrity rule prohibiting punitive damages in arbitrations in New York, where the parties' agreement did not contain a choice-of-law provision.

Similarly, consumers agree to arbitrate pursuant to the rules and regulations of the SRO's in their customer agreements with brokerage firms wherein arbitrators are not bound by any state laws; e.g. evidentiary rules.

I ask the Court to take this letter into account and further modify its decision in *Birbrower* to make express its inapplicability to resolution of disputes arising under consumer/customer agreements with brokerage firms pursuant to the SEC's scheme of arbitration concerning the arbitration of securities purchases before the SRO's.

I am associated with Alison Minet Adams (SBN107475) of Stronach and Adams, who is a member of the bar and also represents the non-attorney securities consumer advocates organization, who joins with me in this letter.

Thank you for your time and consideration.

Very truly yours,

/s/ Nancy K. Undem
Nancy Kay Undem
State Bar No. 177849

Supreme Court, U.S.
FILED
JUN 5 1998
OFFICE OF THE CLERK

No. 97-1798

In The

Supreme Court of the United States

October Term, 1997

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., and KEVIN F. HOBBS,

Petitioners,

vs.

ESQ BUSINESS SERVICES, INC., a California corporation,

Respondent.

On Petition for Writ of Certiorari to the California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S RESTATEMENT OF THE QUESTIONS PRESENTED

1. Are Petitioners precluded from raising an issue of the constitutionality of California's unauthorized practice of law statute, Business & Professions Code § 6125, which they failed to raise in previous federal and state court proceedings in this case?

2. As framed and decided by the California Supreme Court, do the actions and services of attorneys licensed only in New York, performed in California for a California client relative to a dispute arising from a contract governed by California law, constitute unauthorized practice under section 6125 and, if so, does that violation render the fee agreement between the New York attorneys and their California client wholly unenforceable?

3. Does the Federal Arbitration Act preempt a determination by the California Supreme Court that the actions and services of attorneys licensed only in New York, performed in California for a California client in preparation for arbitration of a commercial dispute arising from a contract governed by California law, constitute the unauthorized practice of law under section 6125?

STATEMENT PURSUANT TO RULE 29.6

Respondent ESQ Business Services, Inc., a California corporation, does not have a parent company. ESQ. Ltd. is a nonwholly owned subsidiary of ESQ Business Services, Inc., a California corporation. The owners of ESQ Ltd. are ESQ Business Services, Inc., a California corporation, and Iqbal Sandhu.

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STATEMENT OF JURISDICTION

The Interstate Commerce Clause question presented by Petitioners was not raised in any prior federal or state court proceeding in this case. This Court should therefore decline to consider that question for lack of jurisdiction.

STATEMENT OF THE CASE

The controversy underlying this Petition arises from a New York law firm's attempts to advise a California client about complex questions of California and intellectual property law in a transaction between the California client and another California-based company, and the New York firm's subsequent litigation of disputes concerning that transaction in a California forum.

Petitioners are primarily tax, estate planning, and personal injury lawyers. They were not members of the California Bar, and did not have or obtain the knowledge of California law or knowledge of the subject matter of the engagement necessary for competent representation of their California client. Their advice, which was rendered in substantial measure while physically present in California, regarding supposed claims arising from the California transaction was simply wrong and caused damages in excess of $1 million to the client.

A. Procedural History

Petitioners do not specify the stage and manner in which their Commerce Clause issue was timely and properly raised in prior proceedings. Nor can they do so.

In January 1994, Respondent ESQ Business Services, Inc., a California corporation ("ESQ"), and its sole shareholder, Iqbal Sandhu, filed a Complaint in Santa Clara County, California

Superior Court for negligence and related claims against Birbrower, Montalbano, Condon & Frank, a New York corporation ("Birbrower"), and one of its attorneys, Kevin Hobbs. ESQ and Sandhu included allegations that Hobbs had engaged in the unauthorized practice of law in California and that such violations, along with other independent reasons, rendered fee agreements with Birbrower void and unenforceable.

Birbrower and Hobbs filed a Notice of Removal in the United States District Court for the Northern District of California based only on the ground of diversity of citizenship. Respondent's Appendix ("RA") at 1a-3a. Both Petitioners filed an Answer to the Complaint; the Birbrower firm also filed a Counterclaim to recover fees for work done in both New York and California. Birbrower averred that a separate entity, ESQ Business Services, Inc., a New York corporation ("ESQ-NY"), had acted as an agent for ESQ and Sandhu relative to transactions in controversy. Birbrower did not name ESQ-NY as a party.

ESQ and Sandhu responded by motion for leave to amend their Complaint to add ESQ-NY as a plaintiff (under a claim for declaratory relief to establish that ESQ-NY had no liability to Birbrower), and to remand the case to state court because joinder of ESQ-NY would eliminate diversity. Petitioners opposed these requests, but did not assert that jurisdiction could be maintained because of a claim or right arising under the Constitution or a federal statute. RA at 4a-13a. In April 1994, the District Court entered its Order granting the motions to amend and for remand. The matter returned to the California Superior Court.

There, in November 1995, ESQ requested summary relief declaring void or voidable the fee agreements on which Birbrower based some of its claims for relief. ESQ advanced three independent bases for the motion, the first of which was that Petitioners had violated Business & Professions Code section 6125. In their

opposition to ESQ's motion, Petitioners did not contend that application of section 6125 abridged the Commerce Clause or that application of the California statute to an out-of-state lawyer representing a party in connection with a commercial arbitration was preempted. No paper submitted by either side references the Commerce Clause or the Federal Arbitration Act ("FAA"). The Superior Court granted ESQ's motion. Petitioner's Appendix ("PA") at 60-63.

Petitioners obtained review by the Court of Appeal for the State of California, Sixth Appellate District. They did not mention or suggest any constitutional question in describing the case or framing the issues for the Court of Appeal. RA at 14a-24a. Petitioners again did not argue that section 6125 offended the Commerce Clause or that the state statute was preempted; no reference to the Commerce Clause or the FAA appeared in any brief. The Court of Appeal affirmed the Order of the Superior Court. PA at 45-59.

In their request for review by the California Supreme Court, Petitioners stated the issues in this manner:

> 1. Does an out of state attorney's limited non-courtroom legal work performed in California constitute the "unauthorized practice of law," under Business and Professions Code section 6125?
>
> 2. Is an out of state attorney, barred from enforcing an otherwise valid fee agreement with a client when the legal services include limited work performed in California? RA at 27a. *Also see* RA at 29a-31a.

The California Supreme Court described the issues addressed in its consideration of the case in much the same way:

> We granted review to determine whether Birbrower's actions and services performed in California constituted the unauthorized practice of law under section 6125 and, if so, whether a section 6125 violation rendered the fee agreement wholly unenforceable. PA at 8.

Yet again, there was no reference to a possible Commerce Clause violation in any brief submitted to the California Supreme Court by Petitioners, by ESQ, or by any amicus curiae. Contrary to Petitioners' unsubstantiated assertion (Petition ("Pet.") at 6), no mention of the Commerce Clause was made at oral argument. Like the lower state courts before it, the California Supreme Court said nothing on the subject because the issue never was raised.

By contrast, Petitioners did finally reference the FAA while the matter was before the California Supreme Court. This was done, however, only in Petitioners' reply to the amicus brief of the State Bar of California. ESQ had no opportunity to respond. Although the California Supreme Court was not obliged to address this point, it did so in a fashion consistent with principles of FAA preemption articulated by this Court. PA at 20.

The claims by ESQ and Sandhu against Petitioners for malpractice remain to be tried. Similarly, the question of fee entitlement, if any, by the Birbrower firm remains to be determined pursuant to guidelines set by the California Supreme Court. *See* PA at 28-29.

B. Factual Summary

The facts pertinent to resolution of ESQ's section 6125 claim were not disputed by Petitioners in proceedings before the California courts. Now, however, they emphasize a different tale in support of contentions never raised before. In particular, the existence of a "non-resident client" (ESQ-NY presumably) which

"owned" claims is a fiction which the California Supreme Court appropriately ignored.

In late 1989 or early 1990, Iqbal Sandhu was a young man living in Silicon Valley who had partially developed a software product known as PNA. He received a proposal from Tandem Computers to finance completion and then market PNA on an exclusive basis. Tandem was a Delaware corporation headquartered in Santa Clara County, California.

Sandhu felt he needed legal advice and contacted his older brother, Kamwaljit Sandhu ("Kamal"), who lived in New City, New York, a town 30 miles northwest of New York City. Kamal suggested that Iqbal contact Hobbs, who had previously represented the Sandhu brothers' father and also Kamal's business, ESQ-NY, in several matters.[1] Iqbal contacted Hobbs, and Hobbs undertook the engagement. Hobbs knew that California law would govern the arrangement proposed by Tandem. Neither Hobbs nor any of his colleagues at Birbrower were members of the California Bar. Neither Hobbs nor his firm associated or consulted any California attorney to assist at this or any later stage of the representation.

On March 16, 1990, a written contract (the "Tandem Agreement") was entered in California. Iqbal intended to establish a California entity to perform the contract with Tandem, but was unable to do so before the Tandem Agreement was ready to sign. He therefore arranged for ESQ-NY to execute the Tandem Agreement. Everyone involved, however, understood that Iqbal and the business to be formed by him were responsible for the ESQ "side" of the Tandem Agreement. Hobbs handled incorporation of ESQ in California, but no formal assignment of

1. Despite assertions to the contrary (Pet. at 2-3), there was only a family relationship between the brothers. As Kamal has testified, he was the sole owner and **sole officer** of ESQ-NY, Iqbal had no responsibility for ESQ-NY operations, and was never an employee of that business. Similarly, when ESQ was formed in California, Kamal and ESQ-NY had no substantive role in that enterprise.

the Tandem Agreement from ESQ-NY to ESQ was ever made. Nonetheless, after March 1990, Tandem on one hand and Iqbal and ESQ on the other dealt only with each other under the Tandem Agreement; neither Kamal nor ESQ-NY had further contact with Tandem.

In early 1992, Iqbal became concerned with Tandem's actions and intentions and sought advice from Hobbs. Without researching pertinent law, and without even recognizing that certain critical legal issues were involved, Hobbs convinced Iqbal that ESQ had "multi-million dollar claims" against Tandem. Hobbs also represented that he and his firm were competent to litigate the case. As a result, ESQ entered a contingency fee agreement with the Birbrower firm. Because on its face the Tandem Agreement had identified ESQ-NY as a contracting party, ESQ-NY was named along with ESQ as a "client" in the engagement. However, Iqbal (not Kamal) signed the fee contract as the "authorized agent" of ESQ-NY.[2]

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2. Acknowledging that inclusion of ESQ-NY in the fee contract was a matter of form and not substance, Petitioners made statements regarding ESQ-NY **not** being party under the fee contract to the United States District Court in opposition to the motions to amend and remand:

> ESQ-NY's interests do not need protection since it does not face claims against it that would subject it to liability. It is clear that ESQ-NY is not even a necessary party to this action. RA at 9a.
>
> Defendants have not served ESQ-NY with any action, filed any action against it, nor do they seek any recovery from it. Passing references to ESQ-NY does [sic] not pose any threat to ESQ-NY, even if the claims against plaintiffs were proven. RA at 13a.

These judicial admissions by Petitioners further contradict their current position that ESQ-NY was a real client in connection with the Tandem Agreement controversy.

Thereafter, Hobbs and other Birbrower attorneys engaged in what the California Supreme Court aptly described as extensive practice of law **within** California. *See* PA at 4-5. During the year or more covered by their California activities, Petitioners never consulted with, advised, or reported to ESQ-NY. All attorney-client communications involved only California entity ESQ.[3] When talks to resolve the dispute between Tandem and ESQ neared conclusion, Hobbs directed his protests and legal opinion only to ESQ. No evidence exists that Hobbs even informed ESQ-NY that the matter was being settled.

Settlement documentation (by way of a new agreement between ESQ and Tandem) made no mention of ESQ-NY, did not provide for or include any signature by or assignment from ESQ-NY, and recited that the March 16, 1990 contract had been entered between Tandem and ESQ Business Services, Inc., a California corporation. RA at 33a-37a. In these same papers, which were reviewed by Hobbs, arbitration proceedings were described as being between only Tandem and ESQ, and waivers and releases were provided between only Tandem and ESQ. RA at 33a-34a, 36a-37a.

The parties confirmed, in other words, that from the start there was no New York "client" involved as a matter of substance in the Tandem Agreement or in any dispute related to that contract. Consistent with the reality that ESQ-NY was only a "straw man" and "owned" no claim against Tandem, following settlement of the Tandem dispute ESQ and Birbrower modified their fee agreement and, among other things, eliminated ESQ-NY as a party named in that contract.

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3. ESQ-NY also was not mentioned in Petitioners' communications with third parties. Neither the arbitration demand which Petitioners prepared nor any other communication from them to the American Arbitration Association references ESQ-NY as being the claimant. All such papers prepared by Petitioners say either "ESQ" or "ESQ Business Services, Inc." and no more.

Petitioners were not in-house lawyers, outside general counsel to a bi-coastal enterprise, or even a multi-state firm. Despite characterizations of the Tandem Agreement as involving "international marketing" of PNA, the underlying dispute between ESQ and Tandem did not require attention from attorneys skilled in the laws of several different jurisdictions. Rather, the controversy arose under California law and could have been handled by a member of the California Bar without leaving the San Francisco Bay Area. Under the undisputed facts actually presented below on which the decision of the California court was based, the *Birbrower* opinion creates no cause for constitutional concern.

REASONS FOR DENYING THE WRIT

I. JURISDICTION DOES NOT EXIST FOR REVIEW OF ISSUES NOT PRESENTED TO AND DECIDED BY A STATE COURT OF LAST RESORT.

Petitioners' Commerce Clause argument is raised for the first time. This Court therefore lacks jurisdiction to determine substantive matters raised at pages 11 to 29 of the Petition. *See* 28 U.S.C. § 1257(c); *Adams v. Robertson*, __ U.S. __, 117 S. Ct. 1028, 1029 (1997) (per curiam); *Yee v. City of Escondido, California*, 503 U.S. 519, 533 (1992). Before reviewing state decisions, the Court must be satisfied that the state court has had "a fair opportunity to address the federal question that is sought to be presented." *Webb v. Webb*, 451 U.S. 493, 501 (1981). "[T]he court will not decide federal constitutional issues raised . . . for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *accord, e.g., Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (Fifth and Fourteenth Amendment claims regarding Arizona Bar admission practices deemed not seasonably raised).

Sound policy reasons support this rule:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds . . . they should be given the first opportunity to consider them.

Cardinale, 384 U.S. at 439 (citation omitted).

This rationale is operable here. Petitioners never raised a Commerce Clause argument during any previous proceeding, and there is no indication that any lower court believed it was being asked to render a decision under that provision. The California Supreme Court never had opportunity to review, address, or properly consider Commerce Clause assertions made here for the first time.[4] Nor did it have the benefit of a proper record on which resolution of the issue appropriately might be based.

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4. Petitioners mistakenly assert, without citation to or submission of a record, that "[d]uring oral argument, the parties discussed at length the impact of the court of appeal's ruling on interstate commerce." Pet. at 6. This did not occur and, in fact, there is no evidence that the issue was discussed or considered by the California Supreme Court. Not coincidentally, the *Birbrower* decision makes no mention of a Commerce Clause issue. When the highest state court is silent on a federal question, this Court **assumes** that the issue was not properly presented. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). In such circumstances,

(Cont'd)

Petitioners may argue that the California court mentioned the "multistate nature of law practice" in its decision (PA at 21), and thereby implicitly considered application of the Commerce Clause.[5] However, the mere fact that a state court mentions an issue touching upon a federal question is not sufficient to convey jurisdiction on this Court. *See George O. Richardson Machinery v. Scott,* 276 U.S. 128, 132-133 (1928).[6]

Petitioners must establish that the federal question was **actually** presented for decision or has **actually** been decided by the state court, and that the state court's judgment could **not** have been

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(Cont'd)

> the aggrieved party bears the burden of defeating this assumption . . . by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here."

Adams, 117 S. Ct. at 1029 (quoting *Webb*, 451 U.S. at 501).

5. In **limited** instances the Court will review federal questions not raised in the lower courts. However, review is permitted only when (i) the state court did "not decide against a petitioner . . . upon an independent state ground," and (ii) the state court actually "entertain[ed] and decide[d] that question adversely to the federal right asserted." *Orr v. Orr*, 440 U.S. 268, 276-77 (1979).

6. Similarly, Petitioners cannot rely upon decisions involving the "multi-state nature of law practice" cited in their state court briefs to rescue constitutional arguments never specifically raised before. For example, Petitioners referenced *Appell v. Reiner*, 43 N.J. 313, 204 A.2d 146 (1964), and *In re Estate of Waring*, 47 N.J. 367, 221 A.2d 193 (1966), as substantiating their allegedly falling under an exception to section 6125. *See* PA at 20-21. Neither case mentions or cites the Commerce Clause. Neither decision purports to strike down undue burdens on interstate commerce. Even if these cases could support a Commerce Clause argument (which Respondent does not concede), discussion or casual reference to such a case "in the midst of an unrelated argument, is insufficient to inform a state court that is has been presented with a claim subject to [this Court's] appellate jurisdiction under 28 U.S.C. § 1257(2)." *Board of Directors of Rotary International*, 481 U.S. at 550 n.9; *accord, Adams*, 117 S. Ct. at 1030.

rendered without deciding the federal question. *Wilson v. Cook*, 327 U.S. 474, 480 (1946).

Neither California appellate opinion suggests that Petitioners' Commerce Clause issue was actually presented, actually decided, or formed the crux of analysis. The Commerce Clause is not mentioned by the California Supreme Court or the Court of Appeal. It was not addressed in Petitioners' appellate briefs, or in any other brief filed with those courts. Both opinions reflect that interstate commerce was not an important factor or central focus; each court determined, based upon facts not in dispute, that the underlying engagement of Petitioners by ESQ was **intrastate** in nature. While recognizing a need to accommodate attorneys involved in multistate transactions,[7] the California Supreme Court held that Petitioners were ineligible for an "interstate representation" exception to section 6125 because of their "extensive activities within California." PA at 21. The District Court of Appeal held:

> This exception is inapplicable under the facts presented here. . . . *Nothing about this dispute was interstate in nature. Consequently, the exception does not apply.*

PA at 57 (emphasis added).

The ruling below, in other words, rested solely on state law principles. The case hinged not on any constitutional argument, but on a determination about what activity constitutes the "practice of law" under California law. That alone precludes review. *See Lambrix v. Singletary*, __ U.S. __, 117 S. Ct. 1517, 1522 (1997) ("since the state-law determination is sufficient to sustain the decree,

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7. Importantly, the California Supreme Court did **not** hold that there was no "interstate representation" exception. The court left open possible application of such an exception to matters that truly require accommodation of the multistate nature of certain transactions.

any opinion of this court on the federal question would be purely advisory").

Lastly, Petitioners abandoned any right to challenge section 6125 under the Commerce Clause. In light of their consistent failure to even cite the Commerce Clause at every prior stage of adjudication, Petitioners waived the claim. *Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1, 6 (1st Cir. 1992) (a Commerce Clause assertion is not jurisdictional and can be waived by failure to advance the claim at lower court level); *accord, Yakus v. United States*, 321 U.S. 414, 444 (1994).

II. PETITIONERS LACK STANDING TO ASSERT SUPPOSED COMMERCE CLAUSE RIGHTS OF UNIDENTIFIED CLIENTS.

Nearly all of Petitioners' contentions revolve around the thesis that **clients** are harmed by application of unauthorized practice statutes to out-of-state attorneys. Petitioners lack standing to make these arguments because the interests invoked are those of unidentified "clients" rather than their own.

Generally, "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (citations omitted). Third-party standing may be allowed if the litigant suffered injury in fact; the litigant has a close relationship with the third party; and some hindrance exists to the third party ability to assert the rights themselves. *Id.*

Petitioners do not meet these requirements. They have not yet suffered injury since no court has entered a final judgment in this case. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Second, though this Court has characterized the attorney-client relationship as "one of special

consequence," the relationships Petitioners reference are prospective only and not actual client relationships. *Caplin v. Drysdale,* 491 U.S. 617, 623 n.3 (1989); *see California Attorneys for Criminal Justice v. Butts,* 922 F. Supp. 327, 333 (C.D. Cal. 1996) (relationship between criminal defense attorneys and prospective clients not sufficiently definite). More importantly, Petitioners' interests are not consistent with those of many of the "clients" for whom they purport to speak; indeed, this litigation is a prime example of how interests of attorneys and clients can be at odds. *See Amato v. Wilentz,* 952 F.2d 742, 751-753 (3rd Cir. 1991). The rationale for the standing requirement, to ensure effective advocacy, would be hampered by allowing Petitioners to argue Respondent's interests. *Powers,* 499 U.S. at 413.

Finally, there are no obstacles preventing clients from advancing such rights themselves. A client could sue to invalidate section 6125 as violative of interstate commerce protections. No person in the client group, however, has chosen to do so or to challenge any similar statute in force in any other state.

Petitioners may try to rely on the narrow exception created by *United States Department of Labor v. Triplett,* 494 U.S. 715 (1990), to claim that, as attorneys, they have standing to assert the rights of clients. *Triplett* is distinguishable because the attorney and client there shared consistent interests (to provide and to obtain competent representation). By contrast, Petitioners' interest here is to be paid for legal work they performed in a state where they were not authorized to practice law, while Respondent's interest is to assure that state regulations intended to protect clients are enforced.

Moreover, the client group in *Triplett* was homogeneous (those potentially eligible for black lung benefits). Here, however, clients whose interests Petitioners pretend to promote range from sole proprietorships to multinational corporations. Unauthorized practice by out-of-state lawyers means different things and raises different

issues for different types of clients, and varies even further according to the nature of the engagement. Third party standing is not viable under such circumstances, and Petitioners' assertion of Commerce Clause interests of unidentified "clients" should be rejected.

III. THE CALIFORNIA SUPREME COURT EXERCISED APPROPRIATE STATE POWER TO REGULATE THE PRACTICE OF LAW IN A MANNER WHICH DOES NOT VIOLATE THE COMMERCE CLAUSE.

Certiorari also is not proper because Petitioners' claim lacks merit. Although Article I, Section 8 of the Constitution implicitly limits the power of a state to interfere with or impose burdens on interstate commerce, it does **not** prohibit all forms of regulation. The Commerce Clause only prohibits regulation that discriminates against or burdens interstate commerce and thereby impedes private trade in the marketplace. *General Motors Corp. v. Tracy*, __ U.S. __, 117 S. Ct. 811, 818 (1997).

Section 6125 is not discriminatory on its face. It does not inhibit or preclude any out-of-state attorney from practicing in California. The only requirement is that the attorney satisfy California admission standards and remain an active member of the Bar. "There is no discrimination on the basis of non-residency or citizenship in California because neither California citizenship nor residency is a requirement for California bar applicants." *Giannini v. Real*, 911 F.2d 354, 357 (9th Cir.), *cert. denied*, 498 U.S. 1012 (1990).

Where, as here, a regulation is facially neutral and has only indirect effect on interstate commerce, the Court employs the test created in *Pike v. Bruce Church, Inc.*:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its

> effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate purpose is found, then the question becomes one of degree.

397 U.S. 137, 142 (1970) (citations omitted).[8] The balance in this matter is in favor of California's paramount interest in regulating lawyer conduct.

A. No Court Has Held That A State's Long-recognized Interest In Licensing And Regulating Attorneys Violates The Commerce Clause.

> Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the states . . . within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct.

Leis v. Flynt, 439 U.S. 438, 442 (1979). As summarized in *Hoover v. Ronwin*:

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8. Petitioners **incorrectly** assert that it is unclear whether the *Pike* analysis applies. *See* Pet. at 15. Citing *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), they suggest that there are two tests that might govern the analysis of section 6125. The *Brown-Forman* test applies only when statutes are clearly discriminatory. In contrast, the *Pike* balancing test is applied when the statute is facially neutral and has only an incidental effect on interstate commerce. *See Scariano v. Justices of Supreme Court of Indiana*, 38 F.3d 920, 928 (7th Cir. 1994) (holding *Pike* test proper for analysis of interstate commerce clause challenge to Indiana rule allowing out-of-state attorneys to avoid taking bar exam if they practice predominantly in Indiana for five years); *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859, 862 (4th Cir. 1985) (applying *Pike* test to Virginia rule excusing out-of-state attorneys from taking bar exam if they intended to practice full time in Virginia).

> "[T]he regulation of the activities of the bar is at the core of the State's power to protect the public." . . . "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts." Few other professions are as close to the "core of the State's power to protect the public." Nor is any trade or other profession as "essential to the primary governmental function of administering justice."

466 U.S. at 568 n.18 (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *In re Griffiths*, 413 U.S. 717, 722-23 (1973)).

Petitioners **concede** that California has at least some legitimate reason to regulate lawyers who interact with its domiciliaries and courts, including but not limited to "protecting clients from unskilled or unethical lawyers." *See* Pet. at 15. The California Supreme Court noted that section 6125 "is designated to ensure that those performing legal services do so competently." PA at 8. *Accord, e.g., Baron v. City of Los Angeles*, 2 Cal. 3d 535, 540-41, 86 Cal. Rptr. 673, 676 (1970) (bar regulations . . . also safeguard the general public "against the ignorances or evil dispositions of those who may be masquerading beneath the cloak of the legal and supposedly learned and upright profession"); Brakel & Loh, *Regulating the Multistate Practice of Law*, 50 Wash. L. Rev. 699, 701 (1975) (protecting the public from incompetence or unethical conduct on the part of out-of-state attorneys is a legitimate purpose of the unauthorized practice laws).[9]

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9. The importance of California's right regulate the behavior of out-of-state attorneys who practice in the state is highlighted in this case. Before the (Cont'd)

Though bar regulations potentially affect commerce, to Respondent's knowledge no Court of Appeal has invalidated any such rule on Commerce Clause grounds. *See, e.g., Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099, 1107-1111 (3rd Cir.), *cert. denied,* 118 S. Ct. 435 (1997) (New Jersey in-state office and mandatory continuing education rules do not violate Commerce Clause); *Kirkpatrick v. Shaw*, 70 F.3d 100, 103 (11th Cir. 1995) (fitness review requirement not an undue burden on interstate commerce, "especially in light of the expected benefit of protecting Florida's citizens from unscrupulous attorneys"); *Scariano*, 38 F.3d at 928; *Giannini*, 911 F.2d at 357-358; *Goldfarb*, 766 F.2d at 862; *Sestric v. Clark*, 765 F.2d 655, 663 (7th Cir. 1985), *cert. denied,* 474 U.S. 1086 (1986) ("states have been held to have a legitimate interest in regulating the quality of legal practice, and it is not an irrational method of regulation to make nonresident lawyers take the state's bar exam — even though they have already taken a bar exam and practiced in another state . . ."); *see also Shapiro v. Cooke*, 552 F. Supp. 581, 589 (N.D. N.Y. 1982), *aff'd,* 702 F.2d 46 (2d Cir. 1983) ("if a state may constitutionally require all applicants to take [a Bar] examination, the Commerce Clause is not offended by a rule which permits some, but not all, out-of-state attorneys to be admitted on waiver of the examination.").

Petitioners do not cite let alone discuss or distinguish any of these cases. They do not (and cannot) argue that the California Supreme Court created a conflict in Commerce Clause authority. They do not compare California governance of lawyers, either generally or with specific regard to section 6125, to any regulation

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(Cont'd)

California Supreme Court, Petitioners took the position that **even when** they practiced law in California they were **not** obliged to follow the California Rules of Professional Responsibility and statutory provisions (other than section 6125) which govern relationships in California between lawyers and clients.

or rule upheld against Commerce Clause challenge in any of these precedents. They do not contend that section 6125 imposes any greater burden on commerce than was found acceptable in any such prior decision. Inability to place contentions now made in the context of existing law is fatal to the Petition.

B. Petitioners Can Supply No Evidence That Section 6125 Impedes Interstate Commerce.

It is not an unreasonable interference with commerce "for attorneys of other states to be required to take the California bar to be able to practice in California." *Giannini*, 911 at 358-59; *accord*, *Leis*, 439 U.S. at 443 ("This Court, on several occasions, has sustained state bar rules that excluded out-of-state counsel from practice altogether or on a case-by-case basis" [citations omitted]).

Because, as noted, Petitioners failed to make a Commerce Clause claim in any prior proceeding, the record is devoid of evidence of any undue burden associated with section 6125. Secondary authorities, including those on which Petitioners rely, acknowledge that no empirical study has been conducted to assess how application of unauthorized practice statutes to out-of-state lawyers may impact commerce. Brakel & Loh, 50 Wash. L. Rev. at 737-738 (1975); Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice — Is Model Rule 8.5 The Answer, An Answer, or No Answer At All*, 36 S. Tex. L. Rev. 715, 725 n.23, 729-731 (1995); Woolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. Tex. L. Rev. 665, 685 (1995); *see also* Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1, 13 n.47 (1981) (survey **excludes** "decisions involving unauthorized practice by . . . attorneys not licensed in the jurisdiction . . . [which] raise issues substantially different from those addressed in this article."); Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice*

on Federal Law, 45 Kan. L. Rev. 453, 473-474 (1997) (insufficient information available regarding discipline of out-of-state lawyers). No **actual** example is contained in the record below or described in the Petition where interstate commerce was **in fact** excessively hindered by section 6125 or any other effort to regulate interaction between a California resident and an attorney licensed to practice only by another jurisdiction.

Statutory prohibitions enacted by the states against unauthorized practice have existed for more than 200 years, and enforcement of those laws against out-of-state attorneys has taken place over at least 150 years. Annot., *Right of Attorney Admitted in One State to Receive Compensation for Services Rendered in Another State Where He Was Not Admitted to the Bar*, 11 A.L.R.3d 907, 911 (1967) (referencing *Ames v. Gilman*, 51 Mass. (10 Met.) 239 (1845), denying fees to an attorney licensed by New Hampshire based upon a 1785 statute prohibiting unauthorized practice of law in Massachusetts). During the past two centuries, interstate commerce has grown, multi-state business operations have grown, the legal profession has grown, in-house legal departments have been created and have grown, multi-state law firms have emerged and grown. There is no **evidence** that any such progression has been slowed by rules which put an attorney's fees at risk if he plies his trade in a state where he is not authorized to practice law.

There is likewise no evidence that section 6125 impermissibly restricts unidentified "client's" ability to select counsel. There is nothing on the record in this matter indicating that "clients" are or will be deprived of access to a pool of competent attorneys due to enforcement of California's unlicensed practice provision. Indeed, an equally compelling argument is that the statute works to the **benefit** of "clients" by protecting them from incompetent counsel or counsel unfamiliar with local laws, regulations, and practices.[10]

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10. Of course, that is precisely what happened here. This action involves an instance where California clients (not the hypothetical out-of-state client (Cont'd)

Burdens identified by Petitioners as supposedly flowing from the existence of different rules in different states (Pet. at 19, 28) also cannot be deemed excessive. Putting aside the fact that such differences are inherent in our federal system, and putting aside as well the fact (as described in the next section) that unauthorized practice authorities rest upon generally agreed principles, this contention is an embarrassment to the profession. Lawyers are **trained** to identify and understand applicable law. The Commerce Clause was not intended to relieve attorneys from their obligation to follow the rules of professional conduct which exist in each place they may wish to practice.

Potential burden on interstate commerce, if any, has been minimized because the California Supreme Court crafted its opinion carefully to avoid intrusion into the "business" of other states. The most significant portions of the decision, those defining what it means to practice law "**in California**," are expressly limited to relationships involving **California clients**. PA at 10.

The *Birbrower* opinion also creates a safe-harbor relating to interstate commerce aspects of a transaction not connected to California practice of law. According to the California Supreme Court, section 6125 **allows** out-of-state attorneys to enforce fee agreements

> to the extent it is possible to sever the portions of the consideration attributable to [the attorney's] services illegally rendered in California from those attributable to [the out-of-state] services.

PA at 29. Thus, notwithstanding Petitioners' fears, California does **not** seek to regulate the practice of law in other states. PA at 24-28.

(Cont'd)
described in Petitioners' papers) discovered that out-of-state counsel had misled them into an attorney-client relationship and mishandled a transaction and litigation involving California parties and application of California substantive law.

The burdens on interstate commerce, if any, that the California statute imposes are incidental and fall far short of outweighing the benefits that the provision promotes. It does not interfere excessively with interstate commerce and is rationally related to California's strong interest in regulating the practice of law.

C. The California Supreme Court Has Merely Applied A Traditional Rule, And Has Done So In A Way Which Neither Impairs Nor Threatens Interstate Commerce.

The California Supreme Court followed the long established rule that "an attorney who is not admitted to practice in the state where he performs services is not entitled to recover compensation for such services even though he is admitted to practice in another state." 11 A.L.R. 3d at 908; *also see* Daly, 36 S. Tex. L. Rev. at 771 ("[d]enial of fees is a traditional remedy for the unauthorized practice of law by [out-of-state] attorneys . . ."); Woolfram, 36 S. Tex. L. Rev. at 691-692. Recent cases enforcing the "traditional remedy" of denial of fees include *Longval v. W.C.A.B.*, 51 Cal. App. 4th 792, 59 Cal. Rptr. 2d 463 (1996); *Servidone Construction Corp. v. St. Paul Fire & Marine Insurance Co.*, 911 F. Supp. 560 (N.D. N.Y. 1995); *In re Peterson*, 163 B.R. 665 (Bkrtcy. D. Conn. 1994); *Perlah v. S.E.I. Corp.*, 29 Conn. App. 43, 612 A.2d 806 (1992); *Ranta v. McCarney*, 391 N.W. 2d 161 (N.D. 1986); *Peterson Lozoff v. Shore Heights, Ltd.*, 35 Ill. App. 3d 697, 342 N.E. 2d 475 (1976); and *Spivak v. Sachs*, 16 N.Y. 2d 163, 263 N.Y.S. 2d 953 (1965).

The traditional remedy has **not** been afforded mechanical application. Courts have crafted exceptions and on occasion stepped away from strict adherence to avoid results which would offend common sense. *E.g.*, *El Gamayel v. Seaman*, 72 N.Y. 2d 701, 536 N.Y.S. 2d 406 (1988) (permissible for foreign attorney residing in Washington D.C. to advise New York client by telephone regarding status of legal proceeding in Lebanon); *Dietrich Corp.*

v. King Resources Co., 596 F.2d 422 (10th Cir. 1979) (fees allowed for law professor employed as consultant to duly licensed litigation counsel); *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir.) (en banc), *cert. denied*, 385 U.S. 987 (1966) (fees awarded to out-of-state attorney practicing in New York at the invitation of and in association with licensed local counsel because of his specific skill with respect to an issue of federal law raised in a federal lawsuit); *Estate of Waring*, 221 A.2d 193 (isolated instances of physical presence in New Jersey did not preclude award of fees to New York lawyers whose services were performed largely outside New Jersey and did not involve matters of New Jersey law); *Appell*, 204 A.2d 146 ("peculiar circumstances" of "tangled and interwoven elements" of client financial transactions in New York and New Jersey justified recovery by New York lawyers for fees relating to New Jersey issues).[11]

Two critical characteristics permeate these decisions. First, the courts have recognized that because unauthorized practice by out-of-state attorneys can arise in a nearly unlimited number of different forms, the flexibility afforded through case by case adjudication is essential. *E.g.*, *Spanos*, 364 F.2d at 171("questions best left to another day"); *Peterson*, 163 B.R. at 674-675 (holding strictly

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11. Courts in several jurisdictions have undertaken general rule-making pertaining to practice by out-of-state lawyers. *See, e.g. New York Criminal and Civil Courts Bar Association v. Jacoby* [& Meyers], 61 N.Y. 2d 130, 460 N.E. 2d 1325 (1984) (recognizing illegality of out-of-state lawyers' local activities, but permitting multi-state firm to practice through locally licensed lawyers); *The Florida Bar v. Savitt*, 363 So. 2d 559 (Fla. 1978) (establishing rules for out-of-state attorneys of a national law firm to practice locally in association with and under the supervision of licensed lawyers). State courts also have created more limited exceptions by rule and have upheld other exceptions created by statute. *See, e.g.*, Cal. Rules of Court, Rule 983 [pro hoc vice admission] and Rule 988 [Registered Foreign Legal Consultants]; *Consumers Lobby v. Public Utilities Comm.*, 25 Cal. 3d 891, 160 Cal. Rptr. 124 (1980) (upholding statute permitting non-attorney to recover fees for representation in certain administrative agency proceedings).

limited to facts where the court acknowledged that "[t]he contours of the so-called 'federal practice exception' . . . are not sharply defined"); *Estate of Waring*, 221 A.2d at 198 ("questions of unlawful practice will turn on the particular facts presented").

Second, the courts have also recognized that it is important to take account of "modern realities" in commerce and in the practice of law. As stated by New York's highest court more than 30 years ago,

> [t]here is, of course a danger that [New York's statute on unlawful practice] could be stretched to outlaw customary and innocuous practice. We . . . recognize[e] [given] the numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York. We can decide those cases when we get them but they are entirely unlike the present one.

Spivak, 16 N.Y. 2d at 168; *accord, e.g., Spanos*, 364 F.2d at 170-171.

Contrary to Petitioners' cries of apocalypse, a fair reading of the California Supreme Court opinion demonstrates that these salutory characteristics of the decisional law have been enhanced. *Birbrower* expressly endorses the case by case approach appropriate to this subject area. PA at 11. By incorporating Ethical Consideration EC 3-9 of the ABA Model Code of Professional Responsibility, the Supreme Court provides a more complete framework for analysis than appears in prior cases. Moreover, the Court acknowledges specifically that in some instances judicial accommodation must be made for "interjurisdictional practice."

And contrary to Petitioner's protestation that handcuffs have been applied (Pet. at 23), the decision leaves open possibilities for refinement of the traditional rule as future circumstances may demand.

Birbrower also contributes two helpful features to the jurisprudence of unauthorized practice. First, by invoking the doctrine of severability to afford Petitioners an opportunity to recover that portion of their fees earned in New York, potential harshness of the traditional remedy is eased and the "burden," if any, on commerce is reduced.[12] Petitioners' criticisms ring hollow given the fact that the California Supreme Court potentially left them better off than older decisions might dictate.

Second, the California Supreme Court acknowledges in a thoughtful way that there are limits to the reach of state authority to regulate the practice of law. PA at 10. This exact formulation already has been quoted, adopted, and applied by the highest court of another state. In *Fought & Company, Inc. v. Steel Engineering and Erection, Inc.*, 87 Haw. 37, 951 P.2d 487 (1998), the Supreme Court of Hawaii was asked whether fees could be claimed for the work of an out-of-state attorney who assisted local counsel to handle a Hawaii lawsuit without being physically present in that state. Although Petitioners cite this decision (Pet. at 28), they neglect to mention that it creates **no** conflict with *Birbrower* and does **not** demonstrate that the law in this area is in turmoil. To the contrary,

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12. Some prior cases suggest an "all or nothing" attitude, even depriving the attorney of compensation for work conducted in his "home" state. *See Ginsburg v. Fahrney*, 45 Misc. 2d 777, 258 N.Y.S. 2d 43 (1965). The few departures rely on the doctrine of *quantum meruit*, which can present more difficult problems of proof for the unpaid lawyer. *E.g., Western Life Insurance Co. v. Nanney*, 296 F. Supp. 432 (E.D. Tenn. 1969) (refusing to enforce state unauthorized practice provision because of interstate nature of underlying matter, but then rejecting attorneys' *quantum meruit* claim for fees).

the Hawaii Supreme Court builds on the analytical process articulated by the California Supreme Court. Expressly applying the "factors suggested by *Birbrower*," the *Fought* tribunal concluded that the out-of-state attorney was not subject to regulation by Hawaii even though he had assisted the client dealing with a litigation in that state.

Thus, in the very first unauthorized practice case in which *Birbrower* is cited, none of the dire consequences for commerce predicted by Petitioners is evident. If anything, *Fought* demonstrates that local regulation of the practice of law following *Birbrower* is not likely to restrict or excessively burden interstate commerce.

IV. IT IS NOT APPROPRIATE TO CONSIDER PETITIONERS' INVITATION TO ESTABLISH A FEDERAL RULE GOVERNING ATTORNEY PARTICIPATION IN COMMERCIAL ARBITRATIONS.

Under the guise of battling a supposed obstacle to commerce, Petitioners in effect ask this Court to instruct the states to draft or interpret unauthorized practice laws to permit an attorney licensed by any jurisdiction to represent clients in commercial arbitrations anywhere else. Pet. at 28. There is no justification for such a request, and likely no authority for issuing any such edict.

Representation of a party in commercial arbitration falls within the definition of the "practice of law." *See, e.g., The Florida Bar Re Advisory Opinion on Nonlawyer Representation In Securities Arbitration*, 696 So. 2d 1178 (Fla. 1997) (identification of client rights at stake before, during, and after arbitration hearing); *Baron*, 2 Cal. 3d at 543, 86 Cal. Rptr. at 678 (representations before certain administrative boards and commissions). The pertinent questions then are whether such acts are "unauthorized," and who should make that determination.

Petitioners are correct that only two cases address the first of these issues.[13] *Birbrower* holds that representation by an out-of-state lawyer in connection with a commercial arbitration is "unauthorized" as defined by the California statute. Conversely, the U.S. District Court in *Williamson v. John D. Quinn Const. Corp.*, 537 F. Supp. 613 (S.D. N.Y. 1982), held that similar activities were not "unauthorized" under New York law. There are reasons why these two decisions are distinguishable, including reasons beyond those noted by the California Supreme Court (PA at 17-18)[14] and beyond the obvious observation that a district court's interpretation of state law is not controlling. But even assuming *arguendo* that a schism in authority exists, attempted resolution by this Court is not warranted.

Regulation of the practice of law is part of the sovereign power reserved to the states. *Hoover*, 446 U.S. at 569 n.18; *Hawkins v. Moss*, 503 F.2d 1171, 1175-76 (4th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975) ("licenses to practice law, granted by the courts of one state, have no extraterritorial effect or value and can vest no

13. A few other pronouncements also exist. *See* N.J. Ethics Op. No. 28 (1994) (one instance of representing a party in arbitration not unauthorized practice); Ill. Ethics Op. No. 94-5 (1994) (several representations in arbitration deemed unauthorized practice).

14. For example, the two fee claimants in *Williamson* were New Jersey lawyers who had been **invited** because of their particular skills to participate in the arbitration in association with the regular outside counsel of a sophisticated client. *Williamson* thus is a near clone to *Spanos* on its facts, and a far cry from this situation (where Petitioners brought no special skill to the engagement, were not invited into the matter by California counsel, and never associated with a member of the California Bar in representing ESQ). Additionally, one of the two New Jersey fee claimants (indeed the sole owner of the small firm under which both practiced) **was also a member of the New York Bar** and a member of the Bar of the District Court. By contrast, no Birbrower attorney was a member of the California Bar. And further yet, the court in *Williamson* seems to have believed that aside from a local bar association report there was no authority pertinent to this issue. That reduces the instructive weight of its decision as well.

right in the holder to practice law in another state"); *see Leis*, 439 U.S. at 443 (no "federal" right to practice law in any state). Article X of the Constitution specifically reserves rights of regulation to the states absent express delegation of authority to the United States. Federal legislation encroaching upon a state's power to set its own standards for bar admission, discipline, and regulation therefore "would stand on somewhat debatable constitutional foundations." Woolfram, 36 S. Tex. L. Rev. at 703 n.125; *accord,* Needham, 45 Kan. L. Rev. at 509.

Petitioners forget that the California Supreme Court did **not** reject the proposition that an exemption to section 6125 for general commercial arbitration might be appropriate. Instead, it deemed the issue as "best left for the Legislature." PA at 19. The California Legislature **has** accepted this invitation. As of June 1, 1998, a bill (AB 2086, reproduced at RA 38a-40a), which would exclude out-of-state lawyers' engagements for arbitrations from the scope of the statute, had been approved by the California Assembly and was pending before the State Senate.[15]

The principle of separation of powers is fundamental to governance in the United States. Within California, application of the concept has now directed the question of representation in commercial arbitrations raised in *Birbrower* to the appropriate branch of state government. For this Court to decide the same issue on certiorari, and to do so even before the state has full opportunity to deliberate and possibly act, would jeopardize state sovereignty. It would also interfere with the decision of a state's highest court regarding how authority over questions of public policy should be allocated pursuant to the state's own constitution.

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15. Status of legislation in California is reported on a current basis through the California Legislative Counsel's web site (http://www.leginfo.ca.gov).

Regulation of attorneys in a federal system is not always consistent, logical, or tidy. That is not, however, adequate reason to nationalize all or any part of the practice of law. What the Petition seeks is beyond the appropriate authority of this Court to grant.

V. PETITIONERS PROVIDE NO AUTHORITY OR REASON TO JUSTIFY EXTENSION OF THE FEDERAL ARBITRATION ACT TO LIMIT REGULATION BY THE STATES OF THE PRACTICE OF LAW.

Petitioners do not and cannot identify a conflict in FAA case authority created by the California Supreme Court in this matter. Nor do they explain how any recognized FAA purpose is impaired by state regulation of the practice of law.

This Court has determined that the FAA does not contain an express preemptive provision, and that the FAA does not reflect congressional intent to occupy the entire field of arbitration. *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 479 (1989). Preemption therefore exists only if

> "compliance with both federal and state regulations is a physical impossibility," or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

California Federal Savings and Loan Association v. Guerra, 479 U.S. 272, 281 (1987) (citations omitted). Neither prong of this test applies.

No conflict of the first order exists because it is possible to comply with both section 6125 and the FAA. The FAA does not

mandate general procedures for commercial arbitration[16] and does not address the question of party representation in such a proceeding. Adherence to section 6125 does not require violation of the FAA.

Turning to conflict arising because a state law is inconsistent with the purposes of a federal statute, Congress' principal aim for the FAA was to ensure that "private arbitration agreements are enforced according to their terms." *Volt*, 489 U.S. at 479. The FAA does not prevent "the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself." *Id.* Because "[a]rbitration under the Act is a matter of consent . . . and parties are generally free to structure their arbitration agreements as they see fit," where the parties agree to abide by state rules of arbitration, "enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA. . . ." *Id.* Here, as in *Volt*, the subject arbitration agreement contained a California choice-of-law provision. PA at 4, 20. Application of California's section 6125 thus was in accord with party intent and, under *Volt*, consistent with the FAA goal of honoring such agreements according to their terms.

California Supreme Court treatment of this issue is also consistent with FAA goals identified in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), and reaffirmed in *Volt*, of assuring that matters subject to arbitration are in fact arbitrated and that arbitration awards are enforced. *Moses H. Cone*, 460 U.S. at 24-25. Application of section 6125 to a commercial arbitration does not make the underlying dispute any more or less amenable to arbitration. Similarly, there is nothing in the California Supreme Court opinion or in section 6125 which suggests that the award rendered in a commercial arbitration in

16. Section 7 of the FAA, which deals with the summoning of witnesses before arbitrators, is the only provision in the statute remotely procedural in nature.

which an out of state attorney has represented a party would not be enforceable or enforced. *Cf.* Woolfram, 36 S. Tex. L. Rev. at 692-693. Section 6125 places obligations and risks on the out-of-state lawyer engaged in unauthorized practice, not on the arbitration process or on any party in arbitration proceedings.

CONCLUSION

New York directs its attorneys to obey the standards for professional conduct of each other jurisdiction in which they happen to practice. *See* N.Y. DR 3-101(B). Petitioners ignored this proscription. They never read or considered the California statutes and rules governing lawyer behavior in the state before or during their representation of ESQ in California. Petitioners thus risked the usual consequence for violation of one such rule: loss of fees, at least in part, for unauthorized practice. Not every possible pecuniary loss, however, creates issues of constitutional merit. The Petition should be denied accordingly.

Respectfully submitted,

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APPENDIX

APPENDIX A — NOTICE OF REMOVAL OF ACTION UNDER 28 UNITED STATES CODE SECTION 1441(b) (DIVERSITY) FILED FEBRUARY 11, 1994

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[stamp] Original Filed FEB 11 1994
C-94 02105 JV EAB [stamp]

No. _____

ESQ. BUSINESS SERVICES, INC., a California corporation; et al.,

Plaintiffs,

vs.

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., a New York corporation; et al.,

Defendants.

Appendix A

NOTICE OF REMOVAL OF ACTION
UNDER 28 UNITED STATES CODE
SECTION 1441(b) (DIVERSITY)

Date:
Time:
Dept.:

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that defendants Birbrower, Montalbano, Condon & Frank, P.C., and Kevin E. Hobbs hereby remove to this court, the state court action described below.

1. On January 12, 1994, an action was commenced in the Superior Court of the State of California in and for the County of Santa Clara, entitled ESQ Business Services, Inc., a California corporation and Iqbal Sandhu, plaintiffs, v. Birbrower, Montalbano, Condon & Frank, P.C., a New York Corporation and Kevin E. Hobbs, defendants, as Case NO. CV737595 attached hereto as Exhibit A.

2. The first date on which defendants Birbrower, Montalbano, Condon & Frank, P.C., and Kevin E. Hobbs received a copy of the said complaint was January 14, 1994, when defendants were served via facsimile with a copy of the said complaint in the said state court. A copy of the summons was not included. Defendants Birbrower, Montalbano, Condon & Frank, P.C., and Kevin E. Hobbs received a copy of the summons from the said state court on or about January 21, 1994. A copy of the summons is attached hereto as Exhibit B.

Appendix A

3. This action is a civil action of which this court has original jurisdiction under 28 United States Code section 1332, and is one which may be removed to this court by defendants pursuant to the provisions of 28 United States Code section 1441(b) in that it is a civil action between citizens of different states and the matter in controversy exceeds the sum of $50,000, exclusive of interest in costs because, among other things, plaintiffs' complaint contests a fee agreement between defendants and plaintiffs providing for the payment of $1.15 million. In the complaint, plaintiffs maintain that the reasonable value of defendants' legal services to plaintiffs "was no more than a few hundred thousand dollars, if that." (Plaintiffs' Complaint, ¶ 19.)

4. Defendants are informed and believe that plaintiff ESQ Business Services, Inc., was, and still is, a corporation incorporated under the laws of the State of California, having its principal place of business in the State of California. Defendants are informed and believe that plaintiff Iqbal Sandhu was, and still is, a citizen of the State of California. Defendant Birbrower, Montalbano, Condon & Frank, P.C., was, at the time of the filing of this action, and still is, a corporation incorporated under the Laws of the State of New York, having its principal place of business in the State of New York. Defendant Kevin E. Hobbs was, at the time of the filling of this action, and still is, a citizen of the State of New York. Birbrower, Montalbano, Condon & Frank, P.C., and Kevin E. Hobbs are the only defendants that have been served summons and complaint in this action.

Dated: February 11, 1994

HOGE, FENTON, JONES & APPEL, INC.

By s/ William J. Elfving
WILLIAM J. ELFVING
Attorneys for Defendants

APPENDIX B — DEFENDANTS BIRBROWER, MONTALBANO, CONDON & FRANK, P.C. AND KEVIN F. HOBBS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND AND MOTION FOR REMAND FILED MARCH 25, 1994

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-94 20105 JW (ARB)

ESQ BUSINESS SERVICES, INC., a California corporation; et al.,

Plaintiffs,

vs.

Appendix B

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., a New York corporation; et al.,

Defendants.

AND RELATED COUNTERCLAIM.

DEFENDANTS BIRBROWER, MONTALBANO, CONDON & FRANK, P.C. AND KEVIN F. HOBBS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND AND MOTION FOR REMAND

Date: April 15, 1994
Time: 9 a.m.
Dept.: 8

INTRODUCTION

ESQ Business Services, Inc., and Iqbal Sandhu ("Plaintiffs") originally filed a complaint in this action in Santa Clara County Superior Court. Defendants properly removed the action to this court, on diversity of citizenship grounds. Plaintiffs now seek to amend their complaint to add another plaintiff, a New York corporation also called ESQ Business Services, Inc. ("ESQ-NY"), for the sole purpose of destroying diversity jurisdiction. For the reasons set forth below, defendants respectfully request that this court deny plaintiffs' motion for leave to amend and motion for remand.

FACTUAL BACKGROUND

As stated in plaintiffs' complaint, this dispute arises out of defendants' legal representation regarding a Software

Appendix B

Development and Marketing Agreement with Tandem Computers Incorporated. Plaintiffs initially engaged defendants to give legal advice regarding a proposed agreement with Tandem. Plaintiffs later retained defendants to represent them when a dispute arose out of this Tandem software agreement. Plaintiffs entered into two separate fee agreements with defendants for defendants' legal services. The first was a contingent agreement. The second, was a revised agreement intended to supersede the first. This new agreement was drafted at plaintiffs' request to provide a flat fee, rather than a contingent fee.

Under the terms of the revised attorneys' fee agreement, plaintiffs were required to make installment payments to defendants commencing in December 1993. Instead of making said payment, plaintiffs filed the instant action in Santa Clara County Superior Court. Defendant Birbrower, Montalbano, Condon & Frank, P.C., properly removed the action to this court and filed a counterclaim against plaintiffs for breach of contract and other related claims. Although the counterclaim alleges some involvement of ESQ-NY, defendants did not name ESQ-NY as a counter-defendant, nor seek any recovery against ESQ-NY.

ESQ-NY was a party to the original fee agreement, of which plaintiffs seek declaratory relief. However, plaintiffs intentionally chose not to include ESQ-NY as a plaintiff in this action. Plaintiffs made this decision even though they were fully aware of ESQ-NY's participation when it first filed this lawsuit. Instead, now that this action has been removed to federal court, plaintiffs seek to amend their complaint to include ESQ-NY. Because of plaintiffs' bad faith and improper motive in only now seeking to amend the complaint, this court should exercise its discretion and deny plaintiffs' motion for leave to amend and motion for remand.

Appendix B

LEGAL ARGUMENT

Plaintiffs contend that the rule 15 of the Federal Rules of Civil Procedure permits the requested amendment in this action. In addition, plaintiffs rely on 28 United States Code section 1447(e) to support their position that the motion for leave to amend and the motion to remand should be granted. Plaintiffs' argument fails because (1) section 1447(e) does not apply to this action, and (2) even if the court were to hold section 1447(e) applicable, plaintiffs improperly apply this provision to the circumstances of this action.

I

28 UNITED STATES CODE SECTION 1447(e) DOES NOT APPLY TO THIS ACTION.

Plaintiffs' reliance on 28 United States Code section 1447(e) to support their argument that amendment of the complaint to add ESQ-NY as an additional plaintiff is flawed. Section 1447(e) provides: "If after removal the plaintiff seeks to join additional *defendants* whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand, the action to the state court." (Emphasis added.) (28 U.S.C. § 1447(e).) In the instant action, plaintiffs seek to join an additional non-diverse *plaintiff*, not a defendant. Had Congress intended for this provision to apply to joining plaintiffs, it would have used the word "parties" instead of "defendants." Section 1447(e) does not apply to the circumstances of this case. Further, plaintiffs misrepresent *Righetti* v. *Shell Oil Co.*, 711 F.Supp. 531 (N.D. Cal. 1989). This issue in *Righetti* was whether plaintiff should be granted leave to amend its complaint to substitute a *defendant* for a fictitiously named defendant. The issue was not whether a non-diverse plaintiff could be joined.

Instead, the proper analysis requires compliance with rule 19 of the Federal Rules of Civil Procedure. The Ninth Circuit has used this approach in *Takeda* v. *Northwestern Nat. Life Ins. Co.* (1985) 765 F.2d 815.[1] In its discussion of the propriety of remand the court stated: "Ordinarily, when removal is proper at the outset, federal jurisdiction is not defeated by later changes or developments in the suit." (*Id.* at p. 819.) The exception to this rule, according to *Takeda*, is when an indispensable party would destroy diversity. Accordingly, this court must find that ESQ-NY is indispensable in order to allow its joinder.

Rule 19 of the Federal Rules of Civil Procedure prescribes a bifurcated analysis to determine whether parties should or must be joined. The court must first consider whether the party is necessary under Rule 19(a) of the Federal Rules of Civil Procedure by looking at whether:

> "(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." (Fed. Rules Civ.Pro., rule 19(a).)

---

1. *Takeda* was decided prior to the 1988 amendment of 28 United States Code section 1447 that added subdivision (e). Since the section 1447(e) analysis applies only when a plaintiff seeks to add a non-diverse *defendant*, this court should follow the *Takeda* analysis in this action.

Under this analysis, ESQ-NY is not even a necessary party to this action. Complete relief can be accorded among all parties. Defendants have asserted no claims against ESQ-NY, so its joinder is not necessary. ESQ-NY's interests do not need protection since it does not face claims against it that would subject it to liability. It is clear that ESQ-NY is not even a necessary party to this action.

Even if the court decides ESQ-NY is necessary, "(i)f the party is necessary but his joinder will destroy jurisdiction, as is the case here . . . then we must consider whether 'in equity and good conscience' the action should proceed without his joinder, i.e., whether he is indispensable." (*Takeda* v. *Northwestern Nat. Life Ins. Co., supra*.) Four factors are relevant to this inquiry: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate, (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. (Fed. Rules Civ.Proc., rule 19(b).) Since adding ESQ-NY as a plaintiff would destroy diversity in this action, the court must consider whether "in equity and good conscience" the case should proceed without joinder, or if the case more properly should be remanded to state court.

"The Rule 19 analysis is easily stated, but not so easily applied. The rule emphasizes practical consequences and its application depends on the circumstances of each case." (*Id.*) In the instant action, a judgment rendered without the inclusion of ESQ-NY will not prejudice any parties. Defendants do not seek relief against ESQ-NY and plaintiffs' fear of ESQ-NY's joint and

several liability is unfounded. Any judgment rendered will be adequate even if ESQ-NY is not joined as a party to this case. Finally, the threat of litigation against or by ESQ-NY in a concurrent state court action is de minimis. If ESQ-NY was concerned about that it would have been a named plaintiff in the action from the beginning. It is also relevant that although Iqbal Sandhu, the owner of ESQ Business Services, Inc., of California, chose to be a plaintiff, Kanwaljit ("Kamal") Sandhu, the owner of ESQ-NY, is not named as a plaintiff in the proposed amended complaint. ESQ-NY is not an indispensable party that must be joined to this action. This court may, and should, proceed without joinder of ESQ-NY. Plaintiffs' motions should be denied.

II

EVEN IF THIS COURT RULES THAT 28 UNITED STATES CODE SECTION 1447(e) APPLIES TO THIS ACTION, THE COURT SHOULD DENY PLAINTIFFS' MOTIONS.

Even if the court concludes that section 1447(e) applies to the joinder of non-diverse plaintiffs, balancing of the equities requires that plaintiffs' motions be denied. The court should exercise its wide discretion to deny plaintiffs' motions.

Under the 28 United States Code section 1447(e) analysis, "(t)he determination of whether a joinder of a non-diverse party is appropriate requires a balancing of the equities involved." (*Heininger* v. *Wecare Distributors, Inc.* (S.D. Fla. 1989) 706 F.Supp. 860, 862.) To assist the trial court in its determination of whether a joinder of a non-diverse party is appropriate, the federal courts have outlined several factors to consider. The trial court must consider (1) the extent to which the purpose of the

amendment is to defeat federal jurisdiction, (2) whether plaintiff has been dilatory in asking for amendment, (3) whether plaintiff will be significantly injured if amendment is not allowed, and (4) any other factors bearing on the equities. (See *Heininger* v. *Wecare Distributors, Inc., supra; Hensgens* v. *Deere & Company* (5th Cir. 1987) 833 F.2d 1179.)

A. *Plaintiffs' Proposed Amendment Seeks Only to Destroy Diversity Jurisdiction.*

Plaintiffs' motivation in filing this motion to amend and remand is relevant to the court's analysis.

> "(T)he motive of a plaintiff in seeking the joinder of an additional defendant is relevant to a trial court's decision to grant the plaintiff leave to amend his original complaint. Further, . . . a trial court should look with particular care at such motive in removal cases, when the presence of a new defendant will defeat the court's diversity jurisdiction and will require a remand to state court." (*Desert Empire Bank* v. *Insurance Company of North America* (9th Cir. 1980) 623 F.2d 1371.)[2]

Plaintiffs initiated this lawsuit. They intentionally chose not to name ESQ-NY as a co-plaintiff even though they were fully aware of ESQ-NY's existence and involvement with defendants. Not to be overlooked are the facts that ESQ-NY, not the plaintiffs, entered into the agreement with Tandem. ESQ-NY is owned by

---

2. Although the instant action involves Plaintiffs' seeking to add a non-diverse plaintiff to the complaint, not a defendant, the same inquiry into plaintiffs' motive is applicable.

Kanwaljit Sandhu, Iqbal Sandhu's brother, yet the plaintiffs have not sought to add Kanwaljit Sandhu as a plaintiff. Plaintiffs' coming forward to name ESQ-NY as a co-plaintiff, after the action has been properly removed from state court, reeks of bad faith and ulterior motive. Plaintiffs seek only to undermine the integrity of the federal court and this court should not permit such activity.

B. *Plaintiffs Have Unreasonably Delayed in Naming ESQ-NY as Co-Plaintiff.*

As indicated above, plaintiffs should have named ESQ-NY as a party to this action when they first filed the lawsuit. Had plaintiffs included ESQ-NY in the state court complaint, diversity of citizenship would not have existed, and defendants would have been precluded from removing the action to this court. Plaintiffs' late decision to include a previously known co-plaintiff has already resulted in increased litigation costs. In the interests of judicial economy and fairness, this court should not now sanction plaintiffs' belated amendment. Instead, this court should preclude plaintiffs from amending the complaint at this dilatory stage.

C. *Denial of Amendment Will Not Significantly Injure Plaintiffs.*

Plaintiff asserts that unless the court allows the proposed amendment, "ESQ-NY will face the ongoing threat that defendants will attempt to assert these claims against it in a separate proceeding." (Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Leave to Amend and Motion for Remand, p. 6, lns. 2-4.) Plaintiffs further assert that since the Birbrower Law firm makes allegations involving ESQ-NY in its counterclaim, if proven, these allegations would make ESQ-NY jointly and severally liable for all claims against plaintiffs. This argument hardly deserves a response.

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Defendants have not served ESQ-NY with any action, filed any action against it, nor do they seek any recovery from it. Passing references to ESQ-NY does not pose any threat to ESQ-NY, even if the claims against plaintiffs were proven. The counterclaim does not change the significance of plaintiffs' failure to included ESQ-NY as a co-plaintiff from the outset of this action. This court's denial of plaintiffs' motion to amend and for remand will not significantly harm plaintiffs. In fact, it will not harm plaintiffs at all.

CONCLUSION

Plaintiffs seeks to amend their complaint to add ESQ-NY solely to defeat diversity jurisdiction and to have this court remand the action to state court. Under rule 19 of the Federal Rules of Civil Procedure, ESQ-NY is not an indispensable party, and this action should continue without plaintiffs' proposed amendment. Even if the court decides that section 1447(e) applies to this joinder issue, because of plaintiffs' obvious motive and the lack of harm that will result if the amendment is denied, the court should use its discretion to deny plaintiffs motions. Therefore, defendants respectfully request that this court deny plaintiffs' motion for leave to amend and motion for remand.

Dated: March 25, 1994

HOGE, FENDON, JONES & APPEL, INC.

By s/ William J. Elfving
By s/ David P. Eby
WILLIAM J. ELFVING
Attorneys for Defendants

APPENDIX C — PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION WITH SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

REQUEST FOR STAY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,

SIXTH APPELLATE DISTRICT

No. _____
Santa Clara County Superior
Court No. CV737595

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., a New York corporation, and KEVIN F. HOBBS,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA,

Respondent,

ESQ BUSINESS SERVICES, INC.,

Real Party in Interest.

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PETITION FOR WRIT OF MANDATE
AND/OR PROHIBITION WITH SUPPORTING
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EXHIBITS FILED UNDER SEPARATE COVER

IN THE MANDAMUS PROCEEDING TO VACATE AN ORDER
OF THE SANTA CLARA COUNTY SUPERIOR COURT
HONORABLE JOHN F. HERLIHY, JUDGE

HOGE, FENTON, JONES & APPEL, INC.
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TO: THE HONORABLE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE SIXTH APPELLATE DISTRICT:

NEED FOR IMMEDIATE APPELLATE REVIEW

I

Petitioners Birbrower, Montalbano, Condon & Frank, P.C., a New York corporation, Kevin F. Hobbs, and Thomas A. Condon are defendants and cross-complaintants in the action entitled ESQ BUSINESS SERVICES, INC., v. BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., et al., Civil Action No. CV737595, now pending before the Santa Clara County Superior Court. Petitioners hereby petition this court for a writ of mandate directing Respondent Superior Court of the State of California in and for the County of Santa Clara to: (a) Vacate its order granting the underlying motion for summary judgment and/or adjudication brought by the Real Parties in Interest ESQ Business Services, Inc., and Iqbal Sandhu, and (b) enter a new order denying that motion.

II

In 1992 and 1993, Petitioners, New York attorneys, provided legal services in New York for Real Parties in Interest ESQ Business Services, Inc., and its president Iqbal Sandhu ("RPI") pursuant to a written contingent fee agreement. The underlying litigation involved a dispute between ESQ Business Services and Tandem Computers, Inc. over the marketing rights to certain ESQ computer software. The dispute was to be litigated before the American Arbitration Association, a private tribunal. After Petitioners had invested substantial time on the case, the underlying

dispute settled. Under the contingent fee agreement, Petitioners believe they would be entitled to as much as $10,000,000 for their legal services. However, Petitioners allege that, after the underlying case settled, RPI misrepresented to them the true value of that ESQ-Tandem settlement and coerced Petitioners to accept a substantially lesser "fixed" sum. In reliance on these misrepresentations, Petitioners executed a "fixed" fee agreement with RPI (in lieu of the contingent fee agreement) for the payment of $1,150,000. To date, RPI has failed to pay anything for the legal services rendered. Instead, RPI filed a legal malpractice lawsuit against Petitioners. Petitioners filed a counterclaim for attorneys' fees and related claims of fraud and negligent misrepresentation regarding the fixed fee agreement.

III

On November 16, 1995, RPI filed a motion for summary judgment and/or adjudication as to Petitioners' claim for attorneys' fees. The motion argued that, because Petitioners travelled to California during the ESQ-Tandem litigation on several occasions to assist RPI, Petitioners engaged in the "unauthorized" practice of law in California, thus rendering the fee agreements unenforceable. Respondent Court granted RPI's motion for summary adjudication, ruling that the fee agreements at issue were unenforceable. Respondent Court concluded that, because Petitioners were not members of the California State Bar, Petitioners' limited litigation activity in California constituted the "unauthorized" practice of law. Respondent Court's ruling disposes Petitioners' claims for fees under the two written agreements. It also effectively disposes Petitioners' negligence and fraud claims, as they were based on the "fixed" fee agreement. RPI's malpractice claims remain. Petitioners only real claim remaining against RPI is its quantum meruit claim.

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IV

Respondent court had a clear, present, and mandatory duty to apply controlling law and, more specifically, to deny RPI's motion for summary judgment and/or adjudication. Respondent Court's order granting RPI's motion for summary adjudication constituted an act in excess of its jurisdiction, an abuse of its discretion, and a violation of its duty, because: (a) Petitioners did not engage in the unauthorized practice of law in California; and (b) even if Petitioners' conduct constitutes the unauthorized practice of law, Petitioners are still entitled to fees for services rendered outside of California under the written fee agreements. Respondent Court's order fails to abide by the law as interpreted by the California Court of Appeal.

V

Respondent Court's order bars a substantial portion of Petitioner's case from being heard on the merits, which will cause severe prejudice to Petitioners when the legal malpractice claims proceed to trial. As is, the case will proceed to trial on the legal malpractice claims alone (and Petitioners' quantum meruit claim). Respondent Court's order effectively disposes Petitioners' claims of fraud and negligence. These claims allege that RPI misrepresented the true facts to persuade Petitioners to accept $1,150,000 in lieu of an amount under the contingent fee agreement. Respondent Court's ruling that both fee agreements are unenforceable renders Petitioners' negligence and fraud claims effectively moot. It will be impossible for Petitioners to demonstrate to the trier of fact that RPI coerced Petitioners into signing the "fixed" fee agreement, when, by Respondent Court's order, that very agreement is unenforceable.

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VI

There exists a need for immediate appellate review of Respondent Court's order.[1] Absent review through this Petition, all parties may suffer harm that cannot be corrected on appeal, in that they may be required to try this case twice. The close relationship between Petitioners' attorneys' fees claims and RPI's legal malpractice claims dictates that all claims be tried together. Petitioners' claims for fees under the fee agreements are inextricably related to RPI's claims of legal malpractice. RPI has asserted numerous breaches of fiduciary duty and other acts of legal malpractice. For example, RPI alleges that Petitioners forced RPI into unconscionable fee agreements. Petitioners, on the other hand, allege that RPI voluntarily entered both fee agreements, and further assert that RPI misrepresented the true value of the ESQ-Tandem settlement to persuade Petitioners to accept only $1,150,000. If the legal malpractice claims proceed without Petitioners breach of fee agreement claims, and Petitioners later successfully appeal Respondent Court's order, the entire case will, in essence, need to be retried to determine the validity of the fee agreements. Most of the same witnesses will need to be called. Experts that testified to the attorney standard of care would need to testify again to determine the propriety of the fee agreements. Experts testifying to ESQ's alleged damages would need to be

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1. RPI agree that there exists and need for immediate appellate review of the issues presented by this petition. RPI agree that if the case were to proceed to trial only on the remaining malpractice causes of action, and Petitioners later successfully challenged Respondent Court's order, all parties herein would be required to retry portions, if not all, of the case. On January 9, 1996, Petitioners and RPI jointly requested that Respondent Court vacate the January 16, 1996, trial date pending resolution of the instant Petition. (Exhibit 9 to Petitioners' Appendix ("PA") [PA 281-284].) On January 9, 1996, Respondent Court ordered the January 16, 1996, trial date be vacated. (Exhibit 10 [PA 285-286].)

re-called to evaluate the value of the ESQ-Tandem settlement, and thus the fee under the contingent fee agreement. The parties and percipient witnesses involved, including ESQ and Tandem accountants and personnel, would also need to be re-called to determine the circumstances and value of the fee agreements. Given the potential waste of time, money, and judicial resources that could be avoided by a writ of mandate, such a writ is an appropriate remedy.

VII

By this Petition, Petitioners ask this Court to speak to an important issue never before directly decided by the California Court of Appeal: May an out-of-state attorney, not a member of the California State Bar, collect money pursuant to a valid fee agreement executed out-of-state, for legal services rendered to a California client (and to what extent) when (1) the majority of legal services performed were performed in the attorney's home state, (2) the litigation services performed in California did not involve appearing before a state or federal court, but rather involved advice given to, and negotiation on behalf of, the client, and (3) the legal proceeding was before a private arbitration tribunal.

APPENDIX D — PETITION FOR REVIEW

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ESQ BUSINESS SERVICES, INC., a California corporation; et al.,

Plaintiffs and Respondents,

vs.

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., a New York corporation; et al.,

Defendants and Appellants.

AND RELATED CROSS-COMPLAINT.

After a Decision by the Court of Appeal
Sixth Appellate District Case No. H014880
Santa Clara County Superior Court,
Case No. CV737595

PETITION FOR REVIEW

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PETITION FOR REVIEW

TO: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA.

ISSUES FOR REVIEW

1. DOES AN OUT OF STATE ATTORNEY'S LIMITED NON-COURTROOM LEGAL WORK PERFORMED IN CALIFORNIA CONSTITUTE THE "UNAUTHORIZED PRACTICE OF LAW," UNDER BUSINESS AND PROFESSIONS CODE SECTION 6125?

2. IS AN OUT OF STATE ATTORNEY BARRED FROM ENFORCING AN OTHERWISE VALID FEE AGREMENT WITH A CLIENT WHEN THE LEGAL SERVICES INCLUDE LIMITED WORK PERFORMED IN CALIFORNIA?

APPENDIX E — PETITIONERS' OPENING BRIEF

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

NO. S057125

Santa County Superior Court
Action No. CV737595

Sixth Appellate District Case
No. H014880

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., a New York corporation, and KEVIN F. HOBBS,

Petitioners,

vs.

SANTA CLARA COUNTY SUPERIOR COURT,

Respondent.

ESQ BUSINESS SERVICES, INCORPORATED, et al.,

Real Parties in Interest.

PETITIONERS' OPENING BRIEF

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ISSUES FOR REVIEW

PETITIONERS' ISSUES ON APPEAL

I. DOES AN OUT-OF STATE ATTORNEY'S LIMITED NON-COURTROOM LEGAL WORK PERFORMED IN CALIFORNIA CONSTITUTE THE "UNAUTHORIZED PRACTICE OF LAW" UNDER BUSINESS AND PROFESSIONS CODE SECTION 6125?

II. IS AN OUT-OF-STATE ATTORNEY BARRED FROM ENFORCING AN OTHERWISE VALID FEE AGREEMENT WITH A CLIENT WHEN THE LEGAL SERVICES INCLUDE LIMITED WORK PERFORMED IN CALIFORNIA?

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APPENDIX F — EXCERPTS FROM SOFTWARE MARKETING AND SUPPORT AGREEMENT DATED AUGUST 31, 1993

SOFTWARE MARKETING AND
SUPPORT AGREEMENT

DATED AUGUST 31, 1993

By and Between

TANDEM COMPUTERS INCORPORATED

and

ESQ BUSINESS SERVICES

SOFTWARE MARKETING AND SUPPORT AGREEMENT

THIS SOFTWARE MARKETING AND SUPPORT AGREEMENT (the "Agreement") is made and entered into this 31st day of August, 1993 by and between *Tandem Computers Incorporated*, a Delaware corporation ("Tandem") with its principal place of business at 19333 Vallco Parkway, Cupertino, California U.SA. 95014 and *ESQ Business Services Incorporated*, a California corporation ("ESQ") with its principal place of business at 5300 Stevens Creek B1, San Jose, California 95129.

RECITALS

WHEREAS, Tandem and ESQ entered into that "Software Development and Marketing Agreement" dated March 16, 1990 with respect to the development, enhancement, marketing and support of certain ESQ computer software, generally known as Programmatic Network Administrator and generally described on Exhibit A hereto (the "Original PNA Agreement");

Appendix F

WHEREAS, Tandem and ESQ have certain disputes regarding their respective rights and obligations under the Original PNA Agreement and have commenced an arbitration action with respect thereto;

WHEREAS, Tandem and ESQ desire to settle and resolve their disputes under the Original PNA Agreement and cause said arbitration to be withdrawn and dismissed, and as part of that settlement to terminate the Original PNA Agreement and supersede the same by this Agreement, all on the terms and conditions set forth herein.

Now, Therefore, the parties hereto agree as follows:

1 *Definitions.*

1.1 "Derivative Work" means a work which is based upon one or more pre-existing works, such as a revision, modification, collection, compilation or any other form in which such pre-existing works may be recast, transformed or adapted, and which, in the absence of this Agreement or other authorization by the owner of the pre-existing work, would constitute a copyright infringement or other infringement of proprietary rights of the owner therein.

* * *

from that transaction shall be the lesser of (i) the portion of the revenues from the Bundled Product transaction equitably attributable to the Software included therein (which shall be determined on a pro rata basis, based on the then current "unbundled" stand-alone list price for the items sold or licensed together as the Bundled Product) and (ii) the then "unbundled" stand-alone list price for said Software.

Appendix F

1.17 "Transferred Customers means Tandem Customers transferred from Tandem to ESQ pursuant to Section 3.3.

1.18 "Execution Date" means the date first set forth above (being the date both parties executed this Agreement).

1.19 "Effective Date" means April 1, 1993 (being the date of this Agreement takes retroactive effect).

2 *ORIGINAL PNA AGREEMENT.*

2.1 *Termination.* Subject to Section 4.1.1, the parties hereby novate, terminate and supersede the Original PNA Agreement, with retroactive effect as of the Effective Date. This Agreement shall be effective as of the Effective Date; from and after the Effective Date, the license agreements under which Existing Tandem PNA licensees are licensed to use the Software shall be treated and deemed as if granted under and pursuant to this Agreement.

2.2 *Dismissal of Pending Arbitration.* All arbitration proceedings between Tandem and ESQ pending or contemplated as of the Execution Date and/or relating to the Original PNA Agreement are and shall be terminated and dismissed with prejudice (but without prejudice to ESQ's right to bring an arbitration proceeding relating to royalties payable hereunder or under the Original PNA Agreement if such royalties are not paid in accordance therewith. Each party shall, within five business days after the Execution Date, execute and file as required any and all papers and instruments necessary to implement and to give full effect to this Section 2.2. Each party acknowledges and agrees that this provision is a material part of the consideration for the other party to execute this Agreement and that the other

party would suffer material and irreparable injury (for which money damages would be insufficient) if this provision were breached. Accordingly, each party acknowledges and agrees that the other party shall be entitled to injunctive and other equitable relief to enforce this Section 2.2.

2.3 *Waiver and General Release.* Subject to Section 4.1.1:

2.3.1 Each party hereby acknowledges and agrees, subject to the provisions of Sections 4.1 and 4.3 of this Agreement, that the other party has either fully performed all of its agreements and obligations under the Original PNA Agreement and is not in breach or default thereunder and that to the extent any such breach or default exists or may exist, the same is hereby waived.

2.3.2 Each party intends that Section 2.3 be a full and general release, subject to the provisions of Sections 4.1 and 4.3 of this Agreement, of any and all losses, claims, demands, liabilities, actions, causes of action (including all rights to arbitration), counterclaims and damages, whether at law, equity, or in administrative or arbitration proceedings, whether at common law (regardless of theory) or pursuant to any statute, rule, ordinance or regulation, whether vested or contingent, whether known or unknown, whether liquidated or unliquidated, whether matured or unmatured, whether disputed or undisputed (collectively, "Claims") which such party ever had, now has or which may have or with respect to, resulting from, relating to or under the Original PNA Agreement.

2.3.3 Each party expressly understands and acknowledges that it is possible that unknown Claims may exist, or that known Claims may be understated, and explicitly took

that into account in determining to give this release. Consequently, each party expressly waives, and waives all rights under, California Civil Code section 1542, which provides:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

s/ [illegible] s/ [illegible] _____ (Initials)

3 *LICENSE GRANTS.*

3.1 *By ESQ.* ESQ shall deliver copies (in object code form) of the Software and their updates to Tandem, in order to implement the licenses granted by this Section, from time to time as requested by the Tandem Relationship Manager. ESQ grants Tandem the following licenses:

* * *

APPENDIX G — CALIFORNIA LEGISLATURE ASSEMBLY BILL NO. 2086, AMENDED APRIL 22, 1998

AMENDED IN ASSEMBLY APRIL 22, 1998

CALIFORNIA LEGISLATURE —
1997-98 REGULAR SESSION

ASSEMBLY BILL **No. 2086**

Introduced by Assembly Member Keeley

February 18, 1998

An act to ~~add Section 1284.5~~ to *amend Section 1282.4 of* the Code of Civil Procedure, relating to arbitration.

LEGISLATIVE COUNSEL'S DIGEST

AB 2086, as amended, Keeley. Arbitration: ~~awards~~ *attorneys.*

Existing law requires any person rendering legal services in this state to be admitted to the State Bar of California. Existing law provides that a party to an arbitration has the right to be represented by an attorney.

This bill would permit persons admitted to the bar of any state to represent a party in an arbitration proceeding in this state, or to render legal services in this state in connection with an arbitration proceeding in another state.

~~Existing law authorizes an arbitrator or a court to correct an award made by an arbitrator upon specified grounds and according to specified procedures.~~

Appendix G

~~This bill would authorize an arbitrator to modify, an award upon written request of a party, if the award, on its face, evidences a manifest disregard of the law and results in a substantial injustice; the modification is made prior to confirmation or vacation of the award by a court; and notice of the modification is given to the parties and any court that has been petitioned to confirm, correct, or vacate the award prior to the hearing by the court. Any additional costs, fees, or expenses incurred as part of adjudicating or performing the modification of an award would be payable by the party requesting the modification.~~

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

~~SECTION 1. Section 1284.5 is added to the Code of~~

SECTION 1. Section 1282.4 of the Code of Civil Procedure is amended to read:

1282.4 (*a*) A party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration under this title. A waiver of this right may be revoked; but if a party revokes such waiver, the other party is entitled to a reasonable continuance for the purpose of procuring an attorney.

(*b*) *Notwithstanding any other provisions of law, including Section 6125 of the Business and Professions Code, an attorney admitted to the bar of any state may represent the parties in the course of, or in connection with, an arbitration proceeding in this state, or in connection with rendering legal services in this state in connection with an arbitration proceeding in another state.*

Appendix G

~~Civil Procedure, to read:~~

~~1284.5 (a) Notwithstanding Section 1284 or any other provision of law, an arbitrator may modify an award upon written request of a party, if all the following conditions are met:~~

~~(1) The award, on its face, evidences a manifest disregard of the law and results in a substantial injustice.~~

~~(2) The modification is made prior to confirmation or vacation of the award by a court.~~

~~(3) Notice of the modification is given to the parties and any court that has been petitioned to confirm, correct, or vacate the award prior to the hearing by the court.~~

~~(b) Any additional costs, fees, or expenses incurred as part of adjudicating or performing the modification of an award and shall be paid by the party requesting the modification.~~

MOTION FILED

JUN 4 1998

(3)

No. 97-1798

In the

Supreme Court of the United States

October Term, 1997

Birbrower, Montalbano, Condon & Frank, P.C., and Kevin F. Hobbs,

Petitioners

v.

ESQ Business Services, Inc.,

Respondent

On Petition for Writ of Certiorari to the Supreme Court of California

---

MOTION AND BRIEF *AMICUS CURIAE* OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION IN SUPPORT OF PETITIONER

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25 pp

In the
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MOTION OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Federal Communications Bar Association ("FCBA") respectfully moves under Rule 37(2) (b) of this Court for leave to file the attached brief *amicus curiae* in the above captioned case. In support of this motion, the FCBA states as follows:

1. It is an association of more than 3,000 members, most of whom are attorneys engaged in the practice of communications law. The association is headquartered in Washington, D.C., the situs of the Federal Communications Commission. The mem-

bership of the association is highly concentrated in the District of Columbia, though it has members also in 44 states and 15 foreign countries. Clients of the members of the FCBA are located in every state and in many foreign countries.

2. The nature of the FCBA's interest in this case is to obtain clarification of the extent to which a state, consistent with the Commerce Clause of the United States Constitution, may discriminate against out-of-state lawyers by restricting their ability to move in interstate commerce while representing their clients. Members of the FCBA, by reason of their specialized knowledge and experience representing clients in the multi-faceted communications industry, serve individuals and businesses that are typically located outside the local jurisdictions in which the lawyers have their offices and are admitted to practice. For further discussion of the extent to which the decision in this case impacts communications attorneys and their clients, see the section of the attached brief entitled "Interest of the FCBA as *Amicus Curiae*."

3. The FCBA has addressed requests for consent to the filing of this brief to counsel for both petitioners and the respondent. Consent has been received from counsel for the petitioner. Counsel for the respondent has withheld consent.

4. Rule 37(1) states that an *amicus curiae* brief that brings to the attention of the Court "relevant matter not already brought to its attention" may be of "considerable help" to the Court. This brief meets that test in the following ways:

a. It brings to the attention of the Court the experience and perspective of a specialty bar with a national rather than a local client base.

b. It discusses the interpretation by the California Supreme Court of that state's unauthorized practice statute in the

context of traditional analysis by this Court of restrictions on state statutes by the Commerce Clause of the United States Constitution.

c. It brings to the attention of the Court a vote of the full American Law Institute on May 12, 1998, one week after the petition for certiorari was filed, rejecting the approach in this case of the California Supreme Court, citing its decision, and characterizing the decision as "unduly restrictive."

d. It emphasizes the importance of the Court's taking this case notwithstanding the failure of the California Court to address in its opinion the crucial federal constitutional question, and discusses the law applicable to certiorari review in those circumstances.

For the reasons stated, the Federal Communications Bar Association respectfully asks this Court to grant it leave to file the brief amicus curiae that is submitted with this motion.

R. Clark Wadlow
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/ s /
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June 4, 1998

No. 97-1798

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October Term, 1997

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BRIEF *AMICUS CURIAE* OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION

PRELIMINARY STATEMENT

The Federal Communications Bar Association ("FCBA") submits this brief as *amicus curiae,* pursuant to Rule 37(2) of the Rules of this Court, to urge a grant of certiorari.[1]

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1 This brief is filed accompanied by a motion for leave to file, as required by Rule 37(2)(b). No counsel for any party authored this brief in whole or in part. No person or entity other than the FCBA and its members has made a monetary contribution to the preparation or submission of this brief. None of the parties to this case or their counsel are members of the FCBA.

INTEREST OF THE FCBA AS *AMICUS CURIAE*

The more than 3,000 members of the FCBA are located in 44 states and 15 foreign countries. The membership is principally concentrated in and about the District of Columbia, the seat of the Federal Communications Commission ("FCC").

Clients of Communications Attorneys

FCBA member attorneys represent clients throughout the nation who are active in the following business endeavors, most of which are regulated by the FCC:

- Radio and television stations, both commercial and non-commercial.
- Cable television systems.
- Telephone companies, including facilities-based long distance carriers, local exchange carriers, international carriers, and resellers of telecommunications services.
- Wireless telecommunications companies, such as those providing cellular and PCS service, paging service, and special mobile radio service.
- Internet service providers and content providers.
- Domestic and international satellite companies, including teleport operators, satellite system operators, and earth station licensees.
- Manufacturers of equipment for all the foregoing services.

Substantially all of the operations of these clients involve some type of interstate commerce. While these clients are spread over all 50 states, as well as foreign nations, substantial numbers in all categories are in California. All the major satellite manufacturers are located in California.

FCBA member attorneys also represent numerous entities that do business with entities in the telecommunications industry, such as radio and television program syndicators, municipalities awarding or considering renewal or revision of cable television franchises, or franchises to private competitive telecommunications services, real estate owners and developers negotiating arrangements to provide communications services to their tenants or residents, purchasers of long distance and local exchange capacity and satellite capacity, and police departments and other public safety organizations that communicate by radio.

FCBA attorneys represent investors in, and lenders to, telecommunications entities. They also represent consumer groups and citizen watchdog groups that monitor and report on the performance of broadcasters and others in the telecommunications industry.

Interstate Aspects of Communications Law Practice

Because many telecommunications entities do business in a number of states, and because of the expertise that communications attorneys acquire as to the industry in general and the business and operations of their clients in particular, communications attorneys are frequently called upon by their clients to travel to states other than those in which they regularly practice and are admitted to the bar. They also communicate regularly by telephone, facsimile, computer, and other technological means with their clients, and others on behalf of their clients, in states other than those in which they maintain their offices.

Many communications attorneys have no clients at all in the jurisdictions in which they are admitted to practice. This is particularly true of communications attorneys who are located in the geographically small area of the District of Columbia.

Types of Services to Clients

Communications attorneys are often called upon by their clients to provide advice on matters that involve mixed questions of state and federal law. They are expected by their clients to provide comprehensive service in an economical and efficient manner. In order to do so, they must be able to exercise their professional judgment as to whether questions of state law are so unusual or difficult as to warrant recommending that their clients obtain additional advice from a lawyer who regularly practices in the state the law of which applies.

A large part of the work of communications lawyers involves the purchase and sale by their clients of telecommunications properties, most of which transactions require the approval of the FCC prior to consummation. Communications lawyers are often called upon to negotiate, advise on and draft the agreements of purchase and sale, which do not vary significantly from state to state. They are, however, unique as compared to contracts for the sale of businesses not subject to FCC regulation. In the case of mergers and acquisitions, and the sales or transfers of control of holding companies owning many operational entities, the laws of numerous states as well as federal law may be relevant.

Often communications lawyers are called upon to negotiate, draft and advise on contracts that are ancillary to the contracts of purchase and sale, such as contracts between buyers and investors for capital formation, loan documents from banks and venture capital firms, including security documents, time brokerage agreements which are increasingly utilized in broadcast sale transactions, and management and operating agree-

ments in the cellular and other wireless fields. Almost all of these contracts must meet FCC requirements, and all are governed as well by the law of some state. They are usually contracts with which communications counsel have had a great deal of experience, in numerous states, and with which local counsel in the states have had little experience.

Communications attorneys are also called upon by their clients to be their principal spokespersons and advisors regarding, and the principal drafters of, the numerous documents ordinarily required to close a telecommunications transaction after FCC consent has been obtained. The communications attorney's experience in similar transactions is usually the principal factor in selection by the client for that task. The client will look to the communications attorney for recommendations as to when the advice of local counsel in the state or states involved will need to be sought, as where the sale of real estate is involved or local zoning authority must be obtained. The closings are often held where the client and not the attorney is located.

Other Contract Work for Clients

Aside from such transactional work, communications attorneys are often involved in representing their clients with respect to contracts such as the following with which local counsel in the state of the client's state of residence or principal business activity probably have little experience:

- Cable carriage contracts between television stations and cable systems in their service areas.

- Cable service franchise agreements.

- Interconnection agreements between long distance and local carriers and other entities that participate at various stages in the transmission of voice or data from one user to another user elsewhere in the world.

- Cellular service and pager service contracts, which are often standardized for numerous users in various states.

- Leases by satellite systems of their capacity, which are likewise often standardized for use in various states.

- Coordination contracts between different satellite systems.

- Broadcast program syndication, network service, newswire service, and other program supply contracts.

- Royalty contracts between broadcast stations and organizations such as ASCAP, the American Society of Composers, Artists and Publishers, which represent the holders of copyrights on broadcast material.

In the course of performing this work for their clients, it is often necessary for communications attorneys to travel to the states in which the clients are located, to meet with officers of the clients and outside advisors such as accountants, to confer with representatives of the other party with which the client has entered into or is contemplating a contractual relationship, to discuss strategy with the client, and to give advice. At other times, communications attorneys obtain information and provide advice by telephone or by other interstate electronic means, which may include advice as to state law since every contract must be interpreted and enforced under the law of some state.

Other Work for Clients

Communications attorneys may be called upon to consult with and advise their clients on other matters that have state law aspects. The client may be considering a claim by or against it for breach of contract, or for copyright or service mark infringement, or for unfair competition. The client may call upon the communications attorney to present to investors or lenders the current federal and state regulatory climate per-

taining to the particular business of the client, or the means by which an investment in or loan to the client may be secured, consistent with federal and state law. In order to meet the client's needs, the communications attorney may be called upon to travel to the state in which the client is located or to give advice using interstate means of communications.

Communications attorneys, because of their experience before local public service commissions throughout the country, are often called upon by their clients to appear before commissions in states other than those in which they are admitted to practice. They do so with the implicit or explicit consent of those state commissions, which have included the California Public Utilities Commission.[2]

The above list of areas in which communications lawyers are called upon regularly to serve clients who are located beyond the territorial boundaries of the jurisdictions of their offices and bar admissions is by no means exhaustive. But it illustrates the kinds of situations in which members of the FCBA may now regularly find themselves thwarted in their duty to meet the needs of their clients by uncertainty as to the law of unauthorized practice in view of the *Birbrower* decision.

SUMMARY OF ARGUMENT

The decision of the California Supreme Court in this case clouds the law as to the interstate practice and has caused widespread alarm among attorneys and the clients who depend on their services. It raises serious questions of constitutionality

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2. Whether the California PUC continues to have the power to permit such practice after *Birbrower* is uncertain. The opinion refers to a judicially-created, "narrowly drawn and strictly interpreted" exception to the unauthorized practice statute for appearances before a "state court or tribunal." Appx. p. 12.

application of the Commerce Clause to state restraints on interstate economic activity. The decision has been criticized by the American Law Institute in a recent Restatement as unduly restrictive. The constitutionality under the Commerce Clause of the decision's interpretation of the California unauthorized practice statute should be decided by this Court, or the decision should be reversed and remanded to the California court for its consideration of the Commerce Clause.

REASONS FOR GRANTING THE WRIT

I. *Birbrower* Unsettles the Law and Impedes the Ability of Lawyers with Interstate Practices To Serve Their Clients

Hitherto most communications attorneys have thought that they are not engaged in the unauthorized practice of law as long as they do not practice from an office in a state in which they are not admitted and do not enter an appearance in a state court or other tribunal unless they submit themselves to its disciplinary authority *pro hac vice*. They have not thought that there was any bar to their serving clients in other states who sought their services in a particular matter, including traveling when necessary in interstate commerce and using interstate means of communication.

They have also not believed it necessary to be admitted to the bar of another state in order to research, read, interpret and advise on the law of that state as required to serve their clients on a matter involving interstate commerce. Those clients are not likely to think that their attorney in a distant location, who serves communications clients in many states, has been admitted to the bar of the state where the client is located. Communications lawyers have considered it part of their responsibility to their clients to recognize when the advice of local counsel on state law is necessary and in those instances to recommend that such advice be sought.

The *Birbrower* decision suggests a different interpretation of unauthorized practice, applicable now in only one state, albeit one of the major commercial states of this nation. But unless the constitutional limitation is clarified, California's novel interpretation is subject to adoption by other states which may be encouraged by it to apply that interpretation to out-of-state lawyers.[3] Such a result would seriously impede the rendering of legal services across interstate borders.

The California court seems to say that the sort of services that lawyers routinely perform for their clients are against the law if performed in California by an out-of-state lawyer for a California client, or even if performed from the lawyer's own office in another state if it involves advice on California law.

While the *Birbrower* decision seemingly limits its prohibition to instances in which the services rendered are "substantial" or the lawyer has a "continuing relationship" with the client, neither term is defined. If it is a regular client of the lawyer, the relationship would presumably be deemed "continuing." Most services rendered by communications attorneys to their out-of-state clients would presumably be considered "substantial." Even a matter that an attorney reasonably deemed to be insubstantial at the outset could easily escalate into a substantial matter. At that point, the attorney's resignation from representation would likely impose the greatest hardship on the client and impede a satisfactory resolution of the matter.

Communications attorneys are doubtless not alone in their astonishment at California's application of its unauthorized practice statute. Professor Wolfram of Cornell Law School, in

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3. Avoiding "economic Balkanization" and the "retaliatory acts of other States that may follow" has been recognized by this Court as one of the central purposes of its Commerce Clause jurisprudence. Camps Newfound/Owatonna v. Harrison, --- U.S. ---, 117 S. Ct. 1590, 1599 (1997).

his 1995 article cited on pp. 20 and 24 of the Petition for Certiorari, stated that the California unauthorized practice statute ...

> "... is susceptible of many readings, only one of which would apply it to any legal work in California by an out-of-state lawyer. Under that restrictive interpretation, the statute is probably violated by thousands of out-of-state lawyers daily."[4]

A major malpractice insurer has indicated in a recent bulletin to its members that its "Hotlines on Birbrower, Montalbano, Condon & Frank have caused more member comment than any other Hotline to date."[5] The American Bar Association has featured the case in an article entitled "Lawyer Go Home" in its May 1998 *Journal*.

The problem is not necessarily remedied by lawyers staying home, even if that result were tolerable under the Commerce Clause of the Federal Constitution[6]. The California Court said that it is possible to practice law in that state in violation of its unauthorized practice statute "by telephone, fax, computer, or other modern technological means."[7]

The problem is also not necessarily remedied by associating with a local lawyer in every instance, even when the out-of-state attorney deems the expense of doing so unwarranted for the

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4. Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. Texas L. Rev. 665, 713 n.157.

5. *ALAS Loss Prevention Hotline Bulletin*, via Internet, Wednesday, May 20, 1998.

6. United States Constitution, Article I, Section 8, Clause 3.

7. Appx. to Petition, page 10.

client. The court said in *obiter dictum* that "no statutory exception ... allows out-of-state attorneys to practice law in California so long as they associate local counsel in good standing with the State Bar."[8]

II. The California Court's Interpretation of Unauthorized Practice Impermissibly Burdens Interstate Commerce.

It is virtually undeniable that California's interpretation of its unauthorized practice statute will constitute a deterrent to out-of-state lawyers entering that state to serve their California clients or using interstate means of communication to give needed legal advice to such clients. The California Supreme Court has made attorneys engaging in such activities subject to prosecution for a violation of its criminal law, as well as to denial of compensation for their services.

In this modern day when the commercial interests of businesses frequently extend across state lines, often to all fifty states and foreign countries, when businesses seek the lawyers wherever located who have the expertise to help them, and when lawyers with such expertise typically have clients in many states, this Court should consider whether the burden placed on interstate commerce by California's restrictive interpretation of its unauthorized practice statute can be sustained as constitutional.

Traditional analysis by this Court of the constitutionality of state statutes under the Commerce Clause calls for an initial determination of whether the statute "facially discriminates against interstate commerce."[9] Discrimination "simply means differential treatment of in-state and out-of-state economic in-

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8. *Id.* at page 6 n.3.

9. Fulton Corporation v. Faulkner, 516 U.S. ---, 116 S. Ct. 848, 855 (1996).

terests that benefits the former and burdens the latter."[10] This Court should grant certiorari for the purpose of determining whether forbidding out-of-state lawyers from meeting the legal needs of their California clients while permitting in-state lawyers to do so discriminates against interstate commerce. In particular, the Court should determine whether the California statute, as applied in *Birbrower* to out-of-state lawyers, can withstand the analysis applied to "local processing requirements" invalidated in the decisions discussed at page 16 of the Petition for Certiorari.

If the statute as interpreted by the California Court facially discriminates against out-of-state interests, it is "*per se* invalid, save in a narrow class of cases in which [the state] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."[11] No such demonstration has been made in this case.

Even, however, if this Court should determine that the California unauthorized practice statute as applied in the *Birbrower* decision "regulates evenhandedly with only 'incidental' effects on interstate commerce,"[12] it must still rule the statute unconstitutional if "the burden on such commerce is clearly excessive in relation to the putative local benefits."[13]

This would presumably require weighing the burden of a statute that if widely enforced against out-of-state attorneys

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10. Oregon Waste Systems v. Department of Environmental Quality, 511 U.S. 93, 99 (1994).

11. C & A Carbone v. Clarkstown, 511 U.S. 383, 392 (1994).

12. Oregon Waste Systems v. Department of Environmental Protection, *Id.* at n.9, and Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

13. Oregon Waste Systems v. Department of Environmental Protection, *Ibid*, and Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

would grind modern multi-state law practice to a halt, against the benefit of preserving the fiction that only members of the California State Bar are capable of serving California clients or of advising them on matters involving California law.

III. States Can Constitutionally Regulate Practice by Out-Of-State Lawyers if They Follow the Restatement Rule.

There is a way for states to enforce their unauthorized practice statutes as to out-of-state lawyers that is consistent with both the common practice of lawyers serving their clients and the Commerce Clause. That way is pointed to by the *Restatement of the Law Governing Lawyers*, recently adopted by the American Law Instititue. Section 3 of the *Restatement*, entitled "Jurisdictional Scope of Practice," states:

"A lawyer currently admitted to practice in a jurisdiction may provide legal services to clients in a matter:

"(1) at any place within the admitting jurisdiction;

"(2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with the requirements for temporary or regular admission to practice before that tribunal or agency; and

"(3) at a place within a jurisdiction in which the lawyer is not admitted to the extent the lawyer's activities in the matter arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) or (2)."

While the Restatement has no force of law, it does represent the considered thinking of many impartial scholars and practicing lawyers as to the proper limits for states to place on interjurisdictional practice. The Comment to Section 3 recognizes "the need to provide effective and efficient legal services to persons and businesses with interstate legal concerns." This need, it says, "requires that jurisdictions not erect unnecessary barriers to interstate law practice." Petitioners would presumably meet the Restatement standard since they were originally

the considered thinking of many impartial scholars and practicing lawyers as to the proper limits for states to place on interjurisdictional practice. The Comment to Section 3 recognizes "the need to provide effective and efficient legal services to persons and businesses with interstate legal concerns." This need, it says, "requires that jurisdictions not erect unnecessary barriers to interstate law practice." Petitioners would presumably meet the Restatement standard since they were originally consulted about the representation in New York, where the retainer agreement was negotiated and signed,[14] and they spent more than 1,000 hours working on the case in their New York office,[15] making trips to California when required to serve their client's needs in the course of representation.

The Restatement Section and Comment were in proposed final draft at the time of the California Supreme Court's decision in *Birbrower*. The draft was adopted by the Institute on May 12, 1998, with an additional comment that stated in part: "Some decisions dealing with the right of an out-of-state lawyer to recover a fee from an in-state client seem unduly restrictive ...." The Comment cited *Birbrower* as such an unduly restrictive decision.

IV. This Court Should Review the Federal Constitutional Question or Remand to the California Court To Do So

This case cries out for a decision on constitutionality. As the Court is well aware, business today is multi-state and often global. Clients with multi-state business concerns expect their lawyers, who know their business, to represent them where and when requested. Those lawyers should not be left in the dark about whether California's super-restrictive construction of its

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14. Opinion of California Supreme Court, Appx. to Petition at page 3.

15. Petition for Certiorari, page 4.

the counsel it deems best able to furnish the advice and representation it needs because that counsel is unwilling to violate what California has declared to be its law, or does not wish to undergo the ordeal of a constitutional challenge.

The remarkable thing about the opinion of the California Supreme Court is that it construed the state unauthorized practice statute so as to impact interstate commerce without ever once mentioning the Commerce Clause of the Federal Constitution. This omission is even more remarkable in that the Petition for Certiorari states, at page 6: "During oral argument, the parties discussed at length the impact of the court of appeal's ruling on interstate commerce."

While the petition does not explain to what extent the Commerce Clause of the United States Constitution was discussed, there are "various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential ...."[16] This Court's jurisdiction "does not depend on citation to book and verse."[17]

If, though, the Court believes that the federal constitutional question was insufficiently drawn into question in the lower court, the more recent decisions of this Court have treated that requirement as prudential rather than jurisdictional.[18] Moreover, even if the requirement is jurisdictional, the Court may consider this important constitutional question if it concludes that the petitioner's alternative basis for seeking certiorari--whether the California unauthorized practice of law statute is preempted by

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16. New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

17. Eddings v. Oklahoma, 455 U.S. 104, 113 n.9 (1982).

18. Illinois v. Gates, 462 U.S. 213, 219 (1983).

question was insufficiently drawn into question in the lower court, the more recent decisions of this Court have treated that requirement as prudential rather than jurisdictional.[18] Moreover, even if the requirement is jurisdictional, the Court may consider this important constitutional question if it concludes that the petitioner's alternative basis for seeking certiorari--whether the California unauthorized practice of law statute is preempted by the Federal Arbitration Act--merits consideration. That question[19] was clearly presented to and ruled on by the California Supreme Court [20] and has drawn separate *amicus* comment in this Court.[21] Having granted certiorari to consider one federal question, this Court has in the past ultimately based its decision on a different federal question not urged in the lower court but apparent on the record.[22]

If the Court agrees with the FCBA that the applicability of the Commerce Clause is an important question, but believes it was insufficiently urged on the California Supreme Court, the accepted procedure would be to vacate the decision and remand the case to the state court for its consideration of the question. That was the course followed in *Vachon v. New Hampshire*,[23]

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18. Illinois v. Gates, 462 U.S. 213, 219 (1983).

19. Raised at pp. i and 29 of the Petition for Certiorari.

20. See Opinion of California Supreme Court at Appx. page 20.

21. See Brief *Amicus Curiae* of the Securities Industry Association.

22. Wood v. Georgia, 450 U.S. 261 (1981) (certiorari granted to consider equal protection claim based on inability to pay fines, but case remanded for consideration of a due process issue not raised in the lower court but apparent from the facts).

23. 414 U.S. 478 (1974).

That procedure would preserve what this Court has described as the importance "in a federal system ... that state courts be given the first opportunity to consider the applicability of state statutes in light of consitutional challenge, since the statutes may be construed in a way which saves their constitutionality."[27] It is indeed possible, if the California Supreme Court did not consider the applicability of the Federal Commerce Clause when it wrote its opinion, that such consideration might cause it to modify the surprising and highly restrictive interpretation that it placed on its state's unauthorized practice statute.

CONCLUSION

For the reasons stated, the Federal Communications Bar Association requests that the Court grant a writ of certiorari to review the decision of the Supreme Court of California and address and decide the constitutional issue in this case.

Respectfully submitted,

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25. Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

MOTION FILED

JUN 4 1998

No. 97-1798

In the Supreme Court of the United States

OCTOBER TERM, 1997

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., ET AL., PETITIONERS

v.

ESQ BUSINESS SERVICES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO FILE A BRIEF FOR AMICI CURIAE AND BRIEF FOR AMICI CURIAE AMERICAN CORPORATE COUNSEL ASSOCIATION, BANC ONE CORPORATION, CISCO SYSTEMS, INC., HEWLETT-PACKARD COMPANY, INTERNATIONAL PAPER COMPANY, AND PACIFIC TELESIS GROUP IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF FOR AMICI CURIAE AMERICAN CORPORATE COUNSEL ASSOCIATION, BANC ONE CORPORATION, CISCO SYSTEMS, INC., HEWLETT-PACKARD COMPANY, INTERNATIONAL PAPER COMPANY, AND PACIFIC TELESIS GROUP IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the American Corporate Counsel Association, BANC ONE CORPORATION, Cisco Systems, Inc., Hewlett-Packard Company, International Paper Company, and Pacific Telesis Group respectfully move for leave to file the attached brief as *amici curiae* in support of petitioners. Petitioners have consented to the filing of this brief, but respondent has withheld consent.

This case presents issues of critical importance both to corporations engaged in interstate commerce that receive legal advice and representation from out-of-state lawyers and to the attorneys (whether in-house or outside counsel) who provide such multi-state services. As major national corporations and the principal organization of in-house corporate counsel, *amici* have a direct and immediate interest in the outcome of the case in this Court.

The American Corporate Counsel Association is a non-profit national bar association for in-house corporate counsel. Since its founding in 1982, ACCA has grown to more than 10,400 members representing approximately 4,600 corporations and other private-sector organizations. In accordance with its longstanding and active role in issues concerning the legal profession and bar requirements, ACCA consistently has promoted standards that facilitate the effective and efficient practice of law and opposed standards that interfere with that objective, including state bar

requirements that discriminate against or burden the national provision of corporate legal services. This case thus is of central importance to ACCA and the clients its members represent. ACCA has participated as *amicus curiae* in a number of cases before this Court. See, *e.g.*, *Swidler & Berlin* v. *United States*, cert. granted, No. 97-1192 (U.S. Mar. 30, 1998); *Virginia Bankshares* v. *Sandberg*, cert. granted, 495 U.S. 903 (1990), rev'd, 501 U.S. 1083 (1991); *Frazier* v. *Heebe*, cert. granted, 479 U.S. 960 (1986), rev'd, 482 U.S. 641 (1987).

BANC ONE CORPORATION, Cisco Systems, Inc., Hewlett-Packard Company, International Paper Company, and Pacific Telesis Group are major national corporations that are engaged in interstate (and international) commerce. In addition, many of their in-house lawyers are members of ACCA. Officers and employees of these companies routinely receive legal advice and representation in California and elsewhere from both inside and outside counsel located in other states. These *amici* therefore are significantly affected by the issue in this case.

Amici believe that their national perspective and extensive practical experience, as reflected in the arguments below, will be of considerable assistance to the Court in its resolution of the important questions presented in the petition. Accordingly, *amici* request that their motion for leave to file a brief in support of petitioners be granted.

Respectfully submitted.

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JUNE 1998

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INTEREST OF THE AMICI CURIAE

The interest of the *amici curiae* is set forth in the accompanying motion for leave to file this brief. Petitioners have consented to the filing of this brief, but respondent has withheld consent.[1]

ARGUMENT

I. THIS CASE PRESENTS AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S REVIEW.

This case presents a question of critical significance both to corporations engaged in interstate commerce that receive legal advice and representation in California and elsewhere from out-of-state lawyers and to the attorneys (whether in-house or outside counsel) who provide such services. The decision of the California Supreme Court construing the state's "unauthorized practice of law" (UPL) statute flies in the face of modern commercial realities for interstate clients and their lawyers. The decision below, if left unreviewed, will have radical and detrimental consequences for the provi-

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[1] Pursuant to S. Ct. R. 37.6, *amici* state that counsel for a party did not author this brief in whole or in part and that no one other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

sion of legal services in this country. Moreover, the California UPL rule constitutes a core violation of the Commerce Clause. Because the issue presented is of fundamental importance and affects the rendition of legal services on a daily basis, and because of the gravity of the Commerce Clause violation, this Court's intervention is called for.[2]

The California UPL rule restricts the provision of legal services in California to members of the California bar. Accordingly, under the decision below, out-of-state practitioners are excluded from advising or representing interstate clients in California in all non-litigation contexts. As this brief demonstrates, such a parochial and protectionist rule violates both of the established standards of the Commerce Clause: it *discriminates* against interstate commerce by favoring California lawyers over their out-of-state competitors in the market for non-litigation services in California, and it *burdens* interstate commerce by making it more expensive and difficult for interstate clients to obtain such legal advice or representation from counsel of their choice. The California UPL rule – which is broadly applicable to all legal counseling, transactional work, and alternative-dispute-resolution procedures in California – thus disqualifies out-of-state counsel who otherwise would be selected by the client and requires the participation of California lawyers who otherwise would be unnecessary. As a result, the rule impairs the provision of the most effective, efficient, and economical legal services by attorneys involved in the interstate practice of law to clients engaged in interstate commerce.

The California Supreme Court's decision ignores the modern interstate practice of law and its essential role in providing legal advice and representation to interstate clients.

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[2] As petitioners demonstrate (Pet. 29-30), the case also raises a substantial question of preemption under the Federal Arbitration Act.

Although it gave lip service to "the interstate nature of modern law practice" (70 Cal. Rptr. 2d at 306), the court's analysis took *no* account of and accorded *no* weight to that consideration. It is a truism that the provision of legal services to clients today is largely and increasingly interstate and even international in character. This reflects a number of developments, including the nationalization and globalization of business, advancements in transportation and communications, greater use of computers and the growing legal and economic importance of "cyberspace," the trend toward specialization of practitioners, and the emergence of consistent legal standards under federal law and uniform state laws. See Pet. 17-22. The California Supreme Court simply disregarded these factors, preferring the state's own interest to that of interstate commerce. As *amici* show below, this intolerably discriminates against and burdens interstate commerce.

The California Supreme Court's decision is of unquestionable public importance. It has been the subject of much – and much critical – commentary.[3] For example, Pro-

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[3] See, *e.g.*, Molly McDonough, *Chicago Bar Association Joins Fray over California Opinion Slamming Door on Out-of-State Lawyers*, CHIC. DAILY L. BULL. 1 (May 14, 1998); Debra Baker, *Lawyer, Go Home: Firms Negotiating Multistate Deals Should Take Heed of California Decision on Unauthorized Practice*, 84 A.B.A.J. 22 (May 1998); Sylvia Stevens, *Bar Counsel: A Cautionary Note*, 58 OR. ST. BAR BULL. 29 (Apr. 1998); Gregory R. Smith, *Out of Practice – Protecting Only California Lawyers Is a Shaky Way to Guard Clients' Rights*, LOS ANGELES DAILY J. 6 (Jan. 27, 1998); Arthur S. Hayes, *License Is Required; No Trespassing*, NATIONAL L. J. A4 (Jan. 19, 1998); Martin Kassman, *Court Puts Limits on Out-of-State Firms*, THE RECORDER 3 (Jan. 6, 1998); *California Supreme Court Denies Unlicensed New York Firm Fees for California Service*, 7 PROFESSIONAL LIAB. LIT. REP. No. 6 at 3 (Andrews Publications, Feb. 1998); *California Supreme Court Bars Fee Payments for New York Firm's Failure to Get State Licensing*, 1 MEALEY'S LIT. REP.: ATTORNEY FEES No. 6 at 1 (Mealey Publications, Jan. 1998); *Today's News*, NEW YORK L. J. 1 (Jan. 7, 1998).

fessor Charles W. Wolfram of Cornell Law School, a leading scholar on the legal profession, has characterized the decision below as "appalling. * * * It is a cloud over interstate law practice."[4] In his view, it "sets the legal field back a quarter of a century at least. * * * [It is] draconian * * * [and] insane."[5] Accordingly, Professor Wolfram urges this Court to grant review because "[t]he opinion is so bad * * * [that the Court] can't let this stand in a modern nation."[6]

Other commentators have expressed similar views. Notably, the Assistant General Counsel of the Oregon State Bar has expressly disagreed with the decision below:

> I am not persuaded that the protection of California citizens from incompetent practitioners justifies the broad rule enunciated in *Birbrower*. I also detect signs of protectionism that are disheartening. The opinion seems to move the profession several steps backwards in our efforts to bring the regulation of lawyers into harmony with modern legal and business practice. I hope it is an anomaly and not the beginning of a trend.[7]

Finally, and of great significance, the American Law Institute on May 12, 1998, approved the RESTATEMENT OF THE LAW GOVERNING LAWYERS. Section 3 of the Restatement rejects the California Supreme Court's rule as a matter of black-letter law, and the Reporter pointedly calls the deci-

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4 See CHIC. DAILY L. BULL. at 22.

5 See 84 A.B.A.J. at 22-23.

6 See CHIC. DAILY L. BULL. at 22.

7 See 58 OR. ST. BAR BULL. at 32.

sion below "unduly restrictive."[8] Furthermore, the comment to the Restatement recognizes, contrary to the decision below, that "the need to provide effective and efficient legal services to persons and businesses with interstate legal concerns requires that jurisdictions not erect unnecessary barriers to interstate law practice."[9]

A decision of California's highest court that has been so roundly criticized by respected authorities, and that has such widespread and deleterious consequences for interstate commerce and the legal profession, plainly warrants this Court's review.

II. BY DISCRIMINATING AGAINST AND BURDENING INTERSTATE COMMERCE, THE CALIFORNIA SUPREME COURT'S INTERPRETATION OF THE STATE'S "UNAUTHORIZED PRACTICE OF LAW" STATUTE VIOLATES THE COMMERCE CLAUSE.

A. The California UPL Rule Violates The Commerce Clause By Discriminating Against Out-Of-State Lawyers Engaged In The Interstate Practice Of Law.

1. The Commerce Clause prohibits state discrimination against interstate commerce.

As this Court has repeatedly held and recently reaffirmed, "it is well established that the [Commerce] Clause * * * embodies a negative command forbidding the States to discriminate against interstate trade." *Associated Industries* v. *Lohman*, 511 U.S. 641, 646 (1994). Grounded in the core

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[8] See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 3, reporter's note to cmt. e at 33 (Proposed Final Draft No. 2, Apr. 6, 1998).

[9] See *id.*, cmt. a at 23.

purpose of the Commerce Clause, this fundamental principle "prohibits economic protectionism – that is, 'regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Id.* at 647. Thus, "[a] cardinal rule of Commerce Clause jurisprudence" proscribes state regulation that "'discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 268 (1984). "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 390 (1994). In this way, the Constitution avoids "'economic Balkanization.'" *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. ___, 117 S. Ct. 1590, 1599 (1997).

Discriminatory state regulation is subject to a "virtually *per se* rule of invalidity * * * [and] 'facial discrimination by itself may be a fatal defect.'" *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality*, 511 U.S. 93, 100-101 (1994). See also, *e.g.*, *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 331-332 (1996); *Associated Industries*, 511 U.S. at 647; *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 891 (1988) ("discrimination * * * renders the regulation invalid without more"). Under this standard, the Court has "routinely struck down" discriminatory state statutes. *New Energy Co.* v. *Limbach*, 486 U.S. 269, 274 (1988).

State regulation can be held to be discriminatory "on the basis of either discriminatory purpose * * * or discriminatory effect." *Bacchus Imports*, 468 U.S. at 270. Accordingly, "a court need not inquire into the purpose or motivation behind a law to determine that in actuality it impermissibly discriminates against interstate commerce." *Associated Industries*, 511 U.S. at 653. Rather, if the state regulation "in its

practical operation work[s] discrimination against interstate commerce" (*Best & Co.* v. *Maxwell,* 311 U.S. 454, 456 (1940)) and thus has the "inevitable effect" of discrimination (*American Trucking Associations* v. *Scheiner,* 483 U.S. 266, 284 (1987)), the Commerce Clause is violated.

This bedrock Commerce Clause principle is well illustrated by a line of cases in which this Court has invalidated state provisions designed to require that specified work be performed by in-state businesses. For example, in *C&A Carbone,* a municipality required that all solid waste generated within the town be processed by a designated local entity, thereby excluding out-of-state waste disposal companies; concluding that "[t]he ordinance thus deprives out-of-state businesses of access to a local market" (511 U.S. at 389), the Court held the provision impermissibly "discriminates" (*id.* at 390) because it "bar[s]" the out-of-state firms and "hoard[s] * * * [the work] for the benefit of local businesses." *Id.* at 392. Similarly, in *South-Central Timber Development, Inc.* v. *Wunnicke,* 467 U.S. 82 (1984), the Court struck down a requirement for in-state processing of timber, explaining that it "'viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could be more efficiently performed elsewhere'" and that "the Commerce Clause forbids a State to require work to be done within the State for the purpose of promoting employment." *Id.* at 100 (plurality opinion). And in cases such as *American Trucking Associations* and *Best & Co.,* the Court declared unconstitutional state taxing statutes that favored in-state entities over their out-of-state competitors on the ground that the Commerce Clause requires that states treat "state boundaries as a neutral factor in economic decisionmaking." 483 U.S. at 283.

2. The California UPL rule discriminates against the interstate provision of legal services.

Under the foregoing principles, the California UPL statute, as construed by the California Supreme Court, violates the Commerce Clause. In its practical and inevitable effect, the California UPL rule discriminates against the interstate provision of legal services to clients in California by requiring out-of-state practitioners (whether in-house or outside counsel) to join the California bar in addition to their home-state bar. Such discrimination substantially excludes out-of-state lawyers from advising or representing California clients and thus constitutes a classic case of prohibited economic protectionism.

a. To begin with, there can be no doubt that the provision of legal services to California clients by out-of-state lawyers involves interstate commerce. See, *e.g.*, *Hishon* v. *King & Spalding*, 467 U.S. 69, 73-74 (1984). Although "the practice of law [i]s a profession," it also has a "business aspect." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788 (1975). See also *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 281 (1985), quoting *Goldfarb*, 421 U.S. at 788 ("the practice of law is important to the national economy," and "the 'activities of lawyers play an important part in commercial intercourse'"); *Camps Newfound/Owatonna*, 520 U.S. at ___, 117 S. Ct. at 1599 n.10 ("[w]e have long noted the applicability of our dormant Commerce Clause jurisprudence to service industries").

b. There also can be no doubt that the California UPL rule discriminates against the interstate provision of legal services. It manifestly tends to favor in-state lawyers over their out-of-state competitors, thereby artificially preserving the market for the benefit of local attorneys. Indeed, as this Court has observed:

> A former president of the American Bar Association has suggested * * * [that] "[m]any of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition."

Piper, 470 U.S. at 285 n.18, quoting Chesterfield Smith, *Time For a National Practice of Law Act,* 64 A.B.A.J. 557 (Apr. 1978). See also 470 U.S. at 285 n.18 (characterizing such a reason as "economic protectionism" and "not 'substantial'"); *Barnard* v. *Thorstenn*, 489 U.S. 546 (1989) (restriction on admission to bar for out-of-state attorneys violates the Privileges and Immunities Clause); *Supreme Court of Virginia* v. *Friedman*, 487 U.S. 59 (1988) (same); *Piper, supra* (same).

For in-house or outside counsel located in another state to advise or represent a client in California, they must become a member of the California bar or risk committing a criminal misdemeanor. Absent California bar membership, the UPL prohibitions would prevent them from advising or representing clients in California regardless of their professional competence or indeed their special qualifications to assist the client, such as their recognized expertise and national reputation in the substantive area of law, their longstanding relationship with and knowledge of the client and its industry, and their involvement in related aspects of the representation in states other than California. In many instances, the UPL rule will require them to study for and pass the California bar exam even though they are experienced attorneys licensed and qualified to practice law in their home state; at the least they will have to incur significant costs to join the California bar and comply with the ongoing requirements of California bar membership – all in addition to the costs and requirements of their home-state bar. See *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 348-349, 350-351 (1977) (state regulation that increases costs of doing business for

out-of-state competitors constitutes discrimination). Moreover, during the often lengthy period prior to their admission to the California bar, these attorneys would be excluded from practicing law in California under the UPL rule.

This categorical discrimination against the interstate practice of law imposed by the California UPL rule is exacerbated by the breadth of the rule and the importance of the California legal market. The decision below extends to all types of legal services other than judicial litigation. It thus applies, as in this case, to arbitration as well as other forms of alternative dispute resolution such as mediation. Likewise, it reaches all kinds of transactional work and legal counseling, including acquisitions, mergers, and sales of multi-state businesses, nationwide licensing agreements, and nationally standardized consumer contracts. Given that California is the country's most populous state and its role as a national (and international) center of commerce, the discrimination against interstate legal practice inherent in the California UPL rule is especially egregious.

In sum, the California UPL rule is discriminatory protectionism pure and simple. In cases like *C&A Carbone* and *South-Central Timber,* the Commerce Clause did not allow a state to discriminate against out-of-state competitors in order to protect in-state businesses. Similarly, in *American Trucking Associations,* the Commerce Clause condemned a discriminatory Pennsylvania highway tax that benefited in-state truckers and disadvantaged their out-of-state competitors that engaged in interstate trucking services. The California UPL rule suffers from the same constitutional infirmity.

c. As discriminatory and protectionist state regulation, the California UPL rule is, *amici* submit, "invalid without more." *Bendix Autolite,* 486 U.S. at 891. But "[a]t a minimum such facial discrimination invokes the strictest scrutiny

of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979). Under this standard, discrimination is "*per se* invalid, save in a narrow class of cases in which the [state] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C&A Carbone*, 511 U.S. at 392; see also *Hughes*, 441 U.S. at 336 ("'[t]he burden falls on the State to justify * * * [discrimination] in terms of * * * the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake'").

Here, there are no conceivable justifications for the sweeping and categorical exclusion of lawyers licensed in other states from advising or representing clients in California. Although *amici* recognize, of course, the legitimate interest of states in prohibiting incompetent or unethical lawyering, that interest can be adequately served in other, nondiscriminatory ways. Because the state's interest does not require that out-of-state lawyers must join the California bar in order to provide competent and ethical legal services to California clients, the California UPL rule is fatally overbroad and constitutionally unjustified.

To begin with, California can – as in fact it already does – require out-of-state lawyers engaging in legal services in the state to comply with California standards of professional conduct. The Rules of Professional Conduct of the State Bar of California set forth the governing standards. By the terms of Rule 1-100(B)(3), these standards are applicable to a "[l]awyer" who is "a member of the Bar of California *or a person who is admitted in good standing of and eligible to practice before the bar of * * * the highest court of * * * any state*" (emphasis added). As Rule 1-100(D)(2) then expressly provides:

> As to lawyers from other jurisdictions who are not members [of the California bar,] * * * [t]hese rules shall * * * govern the activities of lawyers while *engaged in the performance of lawyer functions in this state* * * *. (Emphasis added.)

These Rules thus serve "to protect the public and promote respect and confidence in the legal profession" (Rule 1-100(A)) with respect to both California-admitted and non-California-admitted attorneys.

California also has available means to deter and sanction incompetent or unethical conduct by out-of-state lawyers. For example, under the decision below, the UPL statute makes it a misdemeanor for a lawyer not admitted to the California bar to practice law in California. In terms of the state's authority, California equally could make it a misdemeanor for a lawyer not admitted to the California bar to engage (with the requisite *mens rea*) in the incompetent or unethical practice of law in California. This criminal sanction substantially serves California's interest without requiring all lawyers advising or representing clients in the state to become members of the state bar.

By the same token, California has the authority to impose other sanctions to promote its interest. It could, for instance, levy monetary penalties for the improper practice of law, and might also be able to order forfeiture of the fees in question. In addition, the state could, as it does now, provide to aggrieved clients a private civil remedy (effectuated through long-arm jurisdiction) for malpractice.

So, too, California could censure incompetent or unethical lawyers and prohibit them from practicing law in the state in the future. Although presumably only the lawyer's home-state bar, and not California, can disbar an unprofessional attorney, California's action censuring an attorney and

precluding his future practice in the state surely would have grave consequences before the lawyer's home-state bar.

Finally, in assessing the adequacy of these non-discriminatory alternatives, three additional considerations are significant. *First,* the California UPL rule excludes attorneys who are members of the bar of other states and who often have extensive experience in the practice of law, in the given legal area and type of transaction or ADR procedure involved, and in advising or representing the particular client. What is more, both substantive and procedural requirements are increasingly consistent across the country as a matter of either federal law or uniform state law such as the Uniform Commercial Code. While California is not bound by the standards of other states, neither can it turn a blind eye to these factors, as the court below did, in determining whether California's discriminatory UPL rule is necessary to further the state's interest.

Second, at least in the common context of corporate clients, the California UPL rule is not needed to protect against incompetent or unethical lawyers. Corporations are relatively sophisticated purchasers of legal services, and that is especially likely to be true in cases involving the interstate provision of legal services. With respect to in-house counsel, such attorneys provide legal services only to their company and thus pose no issue of advising "the unprotected public." *In re Application of R.G.S.*, 541 A.2d 977, 984 (Md. 1988). See RESTATEMENT OF THE LAW GOVERNING LAWYERS cmt. f at 30 & reporter's note to cmt. f at 34; *Unauthorized Practice Opinion*, 98 N.J.L.J. INDEX 399 (May 1, 1975) ("[t]he corporate employer, who is aware of the qualifications and compentency of his attorney-employee, does not require the same protection as the general public"). Moreover, with respect to outside counsel, in-house lawyers for interstate corporations are integrally involved in selecting, working with, and monitoring the performance of outside attorneys.

In addition, because these relations tend to continue over a period of time and a number of matters, the corporate client has a continuing opportunity to oversee counsel and a continuing means both to ensure the adequacy of his services and to pursue and rectify any grievances.

Third, there is no demonstrated basis for California's discriminatory UPL rule that could satisfy the state's burden of justification. This omission is especially telling because, until the California Supreme Court's decision in this case, corporate practitioners widely assumed that the conduct here at issue did not constitute the unauthorized practice of law in California. Despite this prevailing practice, however, the state has not pointed to any widespread abuses or other practical problems that could possibly justify the challenged discrimination against interstate commerce.

For these reasons, California has non-discriminatory alternatives available that sufficiently further its interest in the competent and ethical practice of law in the state. That is particularly so in the case of interstate corporate clients with offices in California, which is the most typical situation involving the provision of legal services by out-of-state counsel. Accordingly, California' discriminatory UPL rule cannot stand under the Commerce Clause.

B. The California UPL Rule Violates The Commerce Clause By Burdening The Interstate Client's Choice Of Out-Of-State Counsel To Advise Or Represent It In California.

1. The Commerce Clause prohibits state burdens on interstate commerce.

In addition to prohibiting state discrimination against interstate commerce, the Commerce Clause also forbids states from burdening interstate commerce. Even "[w]here the statute regulates evenhandedly to effectuate a legitimate

local public interest, and its effects on interstate commerce are only incidental," state regulation will be invalidated if "the burden imposed is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church,* 397 U.S. 137, 142 (1970). Under this standard, "[w]here the burden of a state regulation falls on interstate commerce, * * * [courts] weigh and assess the State's putative interests against the interstate restraints to determine if the burden imposed is an unreasonable one." *Bendix Autolite,* 486 U.S. at. 891.

In undertaking this assessment, the Court first considers the significance of the burden on interstate commerce. See *Pike,* 397 U.S. at 142. In particular, in weighing the burden on commerce, it considers the cumulative effect that would result if the challenged regulation was adopted by each of the 50 states. See *American Trucking Associations,* 483 U.S. at 284. Second, the Court considers the availability of less burdensome alternatives to promote the state's legitimate interests. See *Pike,* 397 U.S. at 142. A state regulation violates the Commerce Clause if it substantially burdens interstate commerce and its purposes could be furthered through less burdensome means.

2. The California UPL rule burdens the interstate client's use of out-of-state counsel.

Here, California's UPL rule imposes substantial burdens on interstate commerce. Most significantly, it burdens the interstate companies that are the clients seeking advice or representation in California from out-of-state attorneys (whether in-house or outside counsel). By making the provision of such services more expensive and less efficient, California impairs the operations of these interstate clients and interferes with their free and informed choice of counsel. This restraint on commerce becomes even clearer by considering the onerous and Balkanizing effect that would result if every state adopted the California rule. Because it substan-

tially burdens interstate commerce, and because there are less burdensome alternatives to further the state's legitimate interest, the California UPL rule violates the Commerce Clause.

a. The circumstances in which the California UPL rule burdens interstate commerce are legion and arise on a regular basis in corporate law departments around the country. The following illustrations tellingly demonstrate the constitutional vice in the California rule.

For example, an interstate corporation may have a number of valid and important reasons for seeking advice or representation in California from an outside attorney who is not a member of the California bar. The attorney may be a recognized national expert in the substantive area of law or type of transaction involved. Likewise, the attorney may have a longstanding relationship with the client that both gives him important information about the company's operations and interests and leads the client to repose a high degree of trust and confidence in his abilities and judgment.

For the same reasons, a corporate client may wish to obtain advice or representation in California from in-house counsel who are not admitted in California. In-house counsel often are the company's experts in a particular area and have responsibility for the issue in other states around the country, and therefore it is appropriate for them to handle such matters in California as well. Similarly, in-house counsel have unique familiarity with and knowledge of the company's organization and objectives that are crucial to advising or representing the client. And in-house counsel frequently handle matters, such as some contract issues or arbitrations, that would not justify the involvement of another lawyer.

In some situations, it is the nature of the matter that causes an interstate corporation to select an out-of-state law-

yer to advise or represent it in California. For instance, a major merger, or large commercial transaction, or standardized form of contract may touch a number (or even all) of the 50 states, and the client understandably wants lead counsel to handle the matter everywhere. Equally, a matter may predominantly raise questions of federal law and only incidentally of state law, and again the company may select a lead attorney with federal expertise to counsel it on related state-law issues.

In fact, in many situations, it is entirely coincidental that a matter arises in California at all. Arbitration under a multi-state contract, for example, might be brought in any of a number of states; and arbitration of a tort or insurance claim could come up wherever a loss has occurred. Likewise, an issue may subsequently arise in California that is related to an already pending matter being handled in another state by a lawyer who is not admitted in California.

In these and countless other situations, the California UPL rule prevents the interstate corporation from utilizing the attorney that can best and most efficiently represent its interests in California. Of course, if the client believes that the involvement of a California attorney is indicated, it can and will retain such counsel. But often it is not necessary or economical to engage an additional attorney. Furthermore, a local attorney may not be needed in many areas where California law follows federal law or is based on a model code or uniform state law such as the Uniform Commercial Code.

In the face of the California UPL rule, interstate corporations confront a number of burdensome and undesirable alternatives. In an extreme case, the company might decide not to have an office in California in order to avoid this problem. Such a result is a clear violation of the Commerce Clause's purpose of an integrated and unfettered national economy.

Alternatively, the company could require that all of its attorneys (both in-house and outside) be admitted to the California bar as well as their home-state bar. However, such multiple bar memberships simply increase the cost of legal services. Moreover, this course would not be feasible, and could cause critical delays or substitutions of counsel, for attorneys who do not regularly provide advice or representation in California and unexpectedly find themselves involved in an issue that arises in California as part of a broader and ongoing matter. What is more, these problems are geometrically compounded if all of the attorneys used by the company have to be members of the bar of each of the 50 states (assuming that could be done at all).

The company could attempt to circumvent those difficulties by using a sufficiently large number of lawyers to make sure that at least one is admitted in every state. But that approach deprives it of the efficiency, expertise, and continuity of using the same lawyer to handle similar issues around the country. The impracticality of this approach is especially evident for in-house legal departments, which frequently are not big enough to ensure that all 50 states are covered.[10] In the end, most companies do not need 50 lawyers (or one lawyer admitted in 50 states, or any combination in between) to advise or represent it in many areas such as antitrust law or the U.C.C.

Finally, the interstate corporation could seek to bring in a California lawyer to. work with its out-of-state counsel. Under the California Supreme Court's decision, however, it is

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[10] According to internal statistics, 60% of ACCA's members practice in in-house law departments of five or fewer attorneys, and another 25% are in law departments of between 6-20 attorneys. A group of 35 in-house attorneys would be among the 200 largest corporate law departments in the country. *200 Largest Law Departments*, 7 CORP. LEGAL TIMES No. 69 at 1 (Aug. 1997).

far from clear that this would satisfy the statute. See 70 Cal. Rptr. 2d at 307 n.3 ("[c]ontrary to the trial court's implied assumption, no statutory exception to [the UPL rule] allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar"). In any event, that alternative also burdens interstate commerce. At a minimum, the mandatory retention of California counsel will inflate the cost of legal services. Indeed, not only will two lawyers have to be retained and paid on the matter, but the need for continuing consultation and coordination between them will further increase the legal bill and give rise to complications and delay. See RESTATEMENT OF THE LAW GOVERNING LAWYERS cmt. e at 27.

In short, the California UPL rule unquestionably interjects significant additional costs and inefficiencies into the provision of legal services in California to interstate corporations. In so doing, it plainly imposes a substantial burden on interstate commerce.

b. As explained above, less burdensome alternatives to the California UPL rule are available to further the state's interest in the provision of competent and ethical legal services. See pages 10-14, *supra*. Accordingly, the California UPL rule violates the Commerce Clause as a burden on interstate corporations' choice of out-of-state counsel to provide effective and efficient advice or representation in California.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1997

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., and KEVIN F. HOBBS,

Petitioners,

vs.

SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent.

ESQ BUSINESS SERVICES, INC.,

Real Party in Interest.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE SECURITIES INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF THE SECURITIES INDUSTRY ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS[1]

Amicus Curiae, the Securities Industry Association, respectfully moves, pursuant to rule 37.2 of the rules of this Court, for leave to file a brief amicus curiae in support of petitioner. The consent of counsel for petitioner has been granted; the consent of counsel for respondents has been sought but not obtained.

Amicus, the Securities Industry Association ("SIA"), is the principal trade association of the securities industry, with more than 800 member firms in the United States and Canada. As a member of the Securities Industry Conference on Arbitration, the SIA has been intimately involved in the arbitration process, the principal dispute resolution mechanism for the securities industry. One function of the SIA is to address judicial issues, as well as legislative and regulatory matters, affecting the securities industry. In the context of arbitration, the SIA has participated amicus curiae before this Court in *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d (1985); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995), and *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 115 S.Ct. 1920,131 L.Ed.2d 985 (1995).

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The decision of the California Supreme Court, holding that a duly licensed member of the bar of another state engaged in the unauthorized practice of law in California by providing legal advice to a long-standing client in the negotiated resolution of a dispute arising in interstate commerce and subject to the Federal Arbitration Act, has highly disruptive consequences for the SIA's members and in-house counsel, as well as for other similarly situated national corporations. The SIA has a substantial interest in the resolution of this matter, as well as experience with the issues which may assist this Court in determining the importance of the case.

Accordingly, the views of the amicus should provide a useful supplement to the briefs of the parties.

DATED: June 5, 1998.

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BRIEF OF THE SECURITIES INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

As set forth in the foregoing motion for leave to file an amicus brief, the SIA is the principal trade association of the securities industry. Its 800 members, employing more than 380,000 individuals, are located throughout the United States and Canada and include investment banks, broker-dealers, and mutual fund companies. SIA members perform the full spectrum of professional securities activities, including retail and institutional brokerage, underwriting and other investment banking activities, money management, and investment advisory services. SIA members are responsible for over ninety percent of the securities business in the United States, virtually all of which is conducted through interstate commerce. The SIA is recognized as a spokesperson for the securities industry in general and the broker-dealer community in particular.

The securities industry has used arbitration as its principal dispute resolution vehicle for years, and the SIA has been intimately involved in the evolution of the arbitration process. The SIA and its members use arbitration to resolve thousands of customer claims annually.[1] Thus

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[1] After this Court's decision in *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 96 L.Ed.2d 185 (1987), arbitration became the principal means of resolving securities disputes between investors and broker-dealers. Linda D. Fienberg, The NASD Securities Arbitration Report: A View From The Inside, 10 NO. 4 Insights 7 (April 1996). In 1997, approximately 5,000 claims were filed with the National Association of Securities

SIA members have a significant interest in ensuring that the process provides a mechanism for resolving disputes quickly, efficiently, economically and fairly. The ability of broker-dealers to be represented by counsel of their choice in arbitration proceedings is an important factor in ensuring the efficiency and economy of those proceedings. This freedom of choice ensures that broker-dealers are represented by the counsel most familiar with their company, the securities industry and its applicable arbitration process. Members of the SIA employ in excess of one thousand attorneys internally. Not surprisingly, the vast majority of the legal staffs of its members are located in New York.

The SIA has a substantial interest in this Court's accepting review of *Birbrower, Montalbano, Condon & Frank, et al.* v. *Superior Court (ESQ Business Services, Inc.)*, 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998). The California Supreme Court's holding in *Birbrower* prevents broker-dealers from being represented by any counsel, including counsel employed internally, other than California State Bar members in arbitration proceedings in California involving the securities industry. *Id.* at 133.[2]

Dealers Regulation, Inc., the principal forum for the securities industry. Claims filed with the New York Stock Exchange and other self-regulatory organizations number approximately 1,000.

[2] Security industry proceedings are governed by arbitration rules adopted by the National Association of Securities Dealers Regulation, Inc. or by the various exchanges, such as the New York Stock Exchange Arbitration Rules, all of which are approved by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934. 15 U.S.C. §§ 78c(a), 78f, 78o-3, 78s.

Birbrower presents a significant problem for broker-dealers because, since most such companies are not based in California, their internal corporate legal staff are generally not located in California and thus are not licensed in California. However, a broker-dealer's in-house counsel is often the best qualified to handle the arbitration by virtue of being the most familiar with the company, the securities industry and the applicable arbitration rules. The *Birbrower* holding thus disqualifies the lawyers most qualified to represent broker-dealers in securities arbitration proceedings. Moreover, coupled with California's broad interpretation of what constitutes that practice of law, *Birbrower* even prohibits in-house counsel from interviewing employees located in California in preparation for arbitration or litigation. Thus, it deprives in-house counsel of the ability to evaluate cases involving their employer.

SIA members believe that the *Birbrower* decision must be overruled or narrowed to enable their own internal in-house lawyers, admitted in states other than California, to represent them, the corporate employer, in securities arbitration proceedings in California.[3]

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[3] Ironically, SIA members' internal counsel can appear in California courts through admission pro hac vice, but, under *Birbrower*, not in the securities industry's arbitration process which this Court has approved. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

SUMMARY OF ARGUMENT

California's unauthorized practice of law ("UPL") statutes should not be unreasonably interpreted so as to hinder the ability of broker-dealers engaged in interstate commerce to use the services of their internal counsel in the dispute resolution process established through the Exchange Act's rule approval mechanism. *Birbrower* does exactly that by rendering internal counsel for a broker-dealer unable to provide national service for that national client. *Birbrower's* holding prevents a company's in-house counsel from rendering legal advice or performing a broad range of legal services "in California" to his or her employer if not licensed in California.[4] *Birbrower's* definition of "in California" is broad enough to encompass even services rendered by a lawyer who is not physically present in California. *See Birbrower, supra,* 17 Cal.4th at 128 ("Our definition [of in California] does not necessarily depend on or require the unlicensed counsel's physical presence in the state.") Such an interpretation of UPL statutes unreasonably limits a lawyer's ability to effectively serve clients, unreasonably and impermissibly

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[4] *Birbrower* interprets California Business and Professions Code Section 6125 which prohibits the "practice of law in California" by anyone who is not an active member of the California bar. California has defined "practice of law" broadly to include the giving of legal advice and preparing legal instruments and contracts. *Birbrower, supra,* 17 Cal.4th at 128. The practice of federal law, foreign law or the law of a sister state is also within the purview of Section 6125. *Bluestein* v. *State Bar,* 13 Cal. 3d 162, 174, 118 Cal.Rptr. 175, 529 P.2d 599 (1974). *Birbrower* makes clear that participation in arbitration also constitutes the practice of law. *Birbrower, supra,* 17 Cal.4th at 133.

burdens interstate commerce and flies in the face of the federal self-regulatory scheme set forth in the Securities Exchange Act.

Corporate counsel for an SIA member must be able to represent their client/employer in all aspects of corporate legal affairs, regardless of the jurisdiction in which the matter arises. As the American Bar Association has noted, "[t]he business of a single client may involve legal problems in several states . . . Competent lawyers licensed in a sister state should not be encumbered and burdened with unreasonable regulation." ABA Committee on Ethics and Professional Responsibility, Formal Opinion 316 (1967). Nothing could be more accurate for SIA members, engaged throughout the United States in the securities business. *Birbrower* deprives SIA members of the services of experienced in-house counsel, thus increasing the cost of business in California, as well as the loss of the intangible benefits of in-house attorneys.

ARGUMENT

A. The *Birbrower* Decision Fails To Account For The Multi-jurisdictional Nature Of The Securities Industry.

Broker-dealers are involved daily in national and international financial markets. Those markets, and the securities business itself, are rarely limited to the state in which the firm's headquarters is located. The need to provide effective and efficient legal services to the highly regulated securities industry with such interstate legal concerns requires that jurisdictions not erect unnecessary barriers to interstate law practice. *See Restatement of the*

Law Governing Lawyers, Proposed Final Draft No. 2 (April 6, 1998) § 3, comment (b).[5]

Preventing a broker-dealer from being represented by either its in-house counsel or its primary outside counsel in securities arbitration proceedings in California simply because that lawyer is not licensed in California is an unnecessary barrier to interstate commerce. First, the rule does not advance the purpose of UPL statutes. UPL statutes are intended to protect California citizens from incompetent attorneys. *Birbrower, supra*, 17 Cal. 4th at 132. Attorneys admitted elsewhere are generally competent to try arbitrations, particularly since arbitrators need not follow the law. *Moncharsh* v. *Heily & Blase*, 3 Cal. 4th 1, 11 (1992). Furthermore, in many cases, including cases involving the securities industry, the law invoked is federal law.

Securities industry firms typically select an outside counsel and hire in-house counsel whom they believe are qualified to handle the firm's legal needs, whether those needs be local or multi-jurisdictional. After making this choice, they should not be forced to hire another lawyer to handle a matter they believe chosen counsel is competent and experienced to handle. Indeed, forcing them to hire another lawyer for a dispute in California burdens the company's conduct of business in California.[6]

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[5] Proposed Draft No. 2 was recently approved by the American Law Institute. Notably, the Reporter's Memorandum to the Draft criticizes *Birbrower* as "restrictive" on a lawyer's right to practice.

[6] Further, it has been noted that such restrictions on a person's choice of lawyer may well be "maintained for anti-

Other states have recognized this fact. As a partial solution, these states permit corporate in-house counsel to give legal advice to their employer without being licensed.[7] *See* Fla. St. Bar R. 17; Kan. Sup. Ct. R. 706; Ky. Sup. Ct. R. 2.111; Md. Bus. Occ. & Prof. Code. Ann. § 10-206(d); Minn. Sup. Ct. R. VI; Mo. Sup. Ct. R. 8.105; Ohio Sup. Ct. R VI § 4(A); Okla. Stat. Ann. App. Tit. V, § 6 (West 1995); S.C. Rules of Ct., R. 405; New Jersey Supreme Court Committee on Unauthorized Practice, Opinion No. 14, 1975 WL 2165 (1975). Additionally, Michigan permits a lawyer licensed in any state to practice law in Michigan if the lawyer is in the state temporarily and is engaged in a particular matter. Mich. Stat. Ann. § 600.916.

Second, as applied to securities arbitration, *Birbrower* does little to ensure the selection of competent counsel by the broker-dealer. Although studying for a state's bar exam may familiarize lawyers with that state's local law, such knowledge is not always required of lawyers participating in securities arbitration proceedings. State procedural and other legal rules generally do not apply to ADR proceedings.[8]

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competitive purposes or with such an effect." *See Restatement of Law Governing Lawyers*, Council Draft No. 13, Title 2, Introductory Note (October 1997).

[7] Florida has observed that a rule requiring all inside corporate counsel to be locally admitted does not "meet the legitimate needs of a modern economy." *In re Amendments to Rules Regulating Florida Bar (I)*, 593 So.2d 1035, 1036 (Fld. 1991).

[8] *See McRae* v. *Superior Court*, 221 Cal. App. 2d 166, 172, 34 Cal. Rptr. 346, 350 (1963) (no right to discovery in arbitration proceedings under either state or federal law); *Bowles Financial*

For example, by contract the broker-dealers and their investing clients typically determine the applicable arbitration rules, such as the National Association of Securities Dealers Arbitration Rules or the New York Stock Exchange Arbitration Rules or the rules of other self-regulatory organizations. *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 1256 (1989). Also, the law applicable in an arbitration proceeding may not be the law of the state in which the proceeding occurs. Choice of law provisions in arbitration agreements are generally enforceable to the extent they govern applicable substantive law. *See Id.; see also Coopers & Lybrand* v. *Superior Court (Schwartz)*, 212 Cal.App.3d 524, 538, 260 Cal. Rptr. 713, 722 (1989) (federal or state law may be displaced by arbitration agreement).

Finally, the rule is not necessary to subject lawyers who practice in California to the state's ethical rules. Even lawyers not licensed in California are subject to the state's disciplinary standards with respect to services performed in California. Ca. Rules of Ct., Rule 1-100(D)(2). Thus, there is generally no compelling reason to force a broker-dealer to retain a lawyer licensed in the state in which the securities arbitration proceeding will occur, especially where in-house counsel or regular outside

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Group, Inc. v. *Stifel, Nicolaus & Co., Inc.*, 22 F. 3d 1010, 1013 (10th Cir. 1994) (rules of evidence not applicable to arbitration proceeding); AAA Securities Arbitration Rules, Rule 32 (1993) (arbitrator need not conform to legal rules of evidence); *Advanced Micro Devices, Inc.* v. *Intel Corp.*, 9 Cal. 4th 362, 381, 36 Cal. Rptr. 2d 581, 593 (1994) (arbitrator may grant remedy court could not).

counsel, neither of whom may be licensed in California, are likely to be the most familiar with not only the company but also the securities industry, its arbitration rules, and the issues in dispute.

B. The *Birbrower* Holding Also Fails to Recognize the Importance of ADR Services.

Wholly apart from the unique role arbitration plays in the securities industry, alternative dispute resolution ("ADR") plays an increasingly important role in our legal system. It provides a fast and economical alternative to resolving a claim in the judicial system. The benefits of ADR have consistently been recognized by the federal legislative and judicial branches. For instance, the House of Representatives recently passed the Alternative Dispute Resolution Act of 1998. The Act, which requires litigants in civil cases filed in federal court to consider using ADR, was passed in an attempt to reduce daunting court backlogs. 1998 HR 3528. This Court's landmark ruling in *Moses H. Cone Mem. Hosp.* v. *Mercury Const. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927 941 (1983) reaffirmed that the Federal Arbitration Act establishes federal policy favoring arbitration. The United States Judiciary Conference and its various Advisory Committees have championed ADR. *Long Range Plan for the Federal Courts*, Judicial Conference of the United States, p. 134 (Dec. 1995).

California likewise recognizes the benefits of ADR. *See Madden* v. *Kaiser Foundation Hospitals*, 17 Cal.3d 699, 706-707, 131 Cal. Rptr. 882, 886, 552 P.2d 1178 (1976) ("Arbitration has become an accepted and favored method of resolving disputes . . . praised by the courts as

an expeditious and economical method of relieving overburdened civil calendars.").

However, *Birbrower* lessens a party's desire to participate in arbitration by limiting a party's choice of counsel to lawyers licensed to practice in California. Although not licensed in California, a company's corporate counsel or regular outside counsel, who is generally best suited to represent the company in ADR proceedings, could represent the corporate entity if the dispute were being resolved in court by applying for admission to practice "pro hac vice." Cal. Rules of Ct., Rule 983. No pro hac vice procedure is available for arbitration. By virtue of being involved in ADR, a favored method of dispute resolution, instead of litigation, corporate entities, including SIA members, are deprived of a means to be represented by counsel of their choice. No sound reason exists for California to limit participation in such proceedings to attorneys licensed in California.

Other states have recognized that permitting only licensed counsel to participate in arbitration proceedings is flawed. For example, in New York, an unlicensed lawyer who participates in arbitration proceedings is not guilty of unauthorized practice of law. *Williamson* v. *John D. Quinn Construction Corporation*, 537 F. Supp. 613, 616 (S.D.N.Y. 1982) (quoting a report by the Association of the Bar of the City of New York); *see also* Mich. Stat. Ann. Code § 600.916. New York's position on unauthorized practice recognizes not only the importance of ADR proceedings but also the uniqueness of such proceedings. Arbitration is an informal process which is vastly different from the judicial forum. *Alexander* v. *Gardner-Denver Company*, 415 U.S. 36, 58, 94 S.Ct. 1011, 1024, 39 L.Ed.2d

147 (1973) (citing differences in the fact-finding process, evidentiary concerns, and procedure). This Court has noted that it is this "informality of arbitral procedure that enables it to function as an efficient, inexpensive and expeditious means for dispute resolution." *Birbrower* both fails to recognize and undercuts the informality of arbitration proceedings by requiring representation by a licensed California lawyer.

Further, in contrast to California, New York's rule regarding unauthorized practice does not burden corporate entities by denying them counsel of their choice. A corporate entity involved in a dispute in California that is being resolved through arbitration must retain a California lawyer instead of using its in-house counsel, thereby incurring additional expense as well as intangible detriment. In New York, a corporate entity would not have to incur that same burden and expense. It has thus been noted that California's unauthorized practice law "primarily serves the interest of local sellers instead of buyers [which could be] called protectionism." Jeffery L. Jacobs, *An Unauthorized Practice*, 17 No.4 Of Counsel 2 (February 16, 1998). This observation rings true in light of the lack of other convincing justification for California's extreme limits on interstate practice.

CONCLUSION

For the foregoing reasons, the SIA urges the Court to grant the petition for certiorari.

DATED: June 5, 1998.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., AND KEVIN F. HOBBS,

Petitioners,

v.

ESQ BUSINESS SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The California Supreme Court

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. If the interstate commerce activities of a client require it to seek non-litigation legal services, may a state in which these activities occur prevent this non-resident client from using its counsel of choice?

2. Whether a state can prevent a client from retaining an out-of-state attorney in the arbitration of a contractual dispute that involves interstate commerce and is subject to the Federal Arbitration Act?

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INTRODUCTION

Respondent's Brief In Opposition concedes this Court has jurisdiction over this case and may review the second question presented. Respondent, however, urges the Court not to review the related interstate commerce issue in Petitioners' first question presented because the issue was not sufficiently raised in the lower courts.

As set forth below, this Court has jurisdiction and may review both questions presented. Petitioners sufficiently raised, and the California Supreme Court passed on, the interstate commerce issues inherent in both of the questions presented for review to this Court. Respondent also claims Petitioners lack standing to assert Commerce Clause rights for clients. Again, Respondent is wrong. Petitioners have suffered actual injury and, as attorneys, have standing to assert the rights of clients.

ARGUMENT

I. The Court Has Jurisdiction To Review This Case

A. This Court May Consider All The Interstate Commerce Issues Presented In The Petition As They Were Sufficiently Raised In The Lower Courts.

Respondent argues that Petitioners waived their Commerce Clause claims because they did not properly raise them in the state courts. In framing the federal question for presentation to the state court, however, the litigant is not bound to follow any particular form of words or phrases.

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential . . .

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). Moreover, this Court's jurisdiction "does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982). Therefore, even though Petitioners may not have explicitly cited Article I, section 8, clause 3 of the Constitution of the United States, the interstate commerce issues were nonetheless sufficiently raised and brought to the attention of the California courts.

Throughout the state court proceedings, Petitioners cited cases specifically dealing with the governance of lawyers involved in interstate law practice as they represent clients involved in interstate matters. Contrary to Respondent's claim (Respondent's Brief, p. 10), these cases directly implicate the Commerce Clause. In *Appell v. Reiner*, 43 N.J. 313 [204 A.2d 146] (1964), the Supreme Court of New Jersey stated that "recognition must be given to the numerous multi-state transactions arising in modern times" and that there may be instances "warranting the ignoring of state lines." *Id.* at 316. And in *Estate of Waring*, 47 N.J. 367 (1966), the New Jersey high court relied on the reasoning set forth in *Spivak v. Sachs*, 16 N.Y.2d 163 [211 N.E.2d 329] (1965):

> [C]hief Judge Desmond . . . [took note] of the danger that the law might improperly be stretched to outlaw customary and innocuous practices and recogniz[ed] that **New York could**

> **not properly penalize every instance in which an out-of-state lawyer comes into New York "for conferences or negotiations relating to a New York client and a transaction somehow tied to New York."**

Estate of Waring, 47 N.J. at 376 (citing *Spivak*, 16 N.Y.2d at 168) (emphasis added). By citing authority that holds a state cannot burden interstate commerce with overly restrictive unauthorized practice of law enforcement, Petitioners clearly implicated the Commerce Clause. Thus, these issues were adequately raised before the California Supreme Court.

Moreover, Petitioners' Reply to the State Bar's Amicus Brief before the California Supreme Court emphasized the interstate relationship of the parties and the international nature of the contract itself. Contrary to Respondent's claim, the interstate practice of law and the interstate nature of the underlying contract were discussed at oral argument before the California Supreme Court. Petitioners explicitly argued that representation of clients in matters involving interstate commerce should be exempted from the reach of Business and Professions Code section 6125.[1]

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[1] Respondent complains there is no evidence that these issues were discussed or considered by the court. Respondent's Brief 9 n.4. Were there such a record, it would show questions posed by Justice Ming Chin, the author of the opinion in question, inquiring how the court might deal with interstate law practice. Amicus California State Bar's counsel responded by suggesting a "personal jurisdiction type" analysis. Petitioners' counsel suggested an analysis dependent upon interstate commerce. Specifically, if the transaction or dispute in question impacted interstate commerce, then any party involved should

Arguments centered on interstate contracts and the multi-state practice of law by definition implicate the Commerce Clause. There is no requirement that petitioner expressly cite the exact text of the Constitution in the lower courts so long as the record shows by "clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-497 (1981). In sum, the interstate commerce questions were sufficiently drawn into question and the California Supreme Court had a fair opportunity to address the federal questions that are now before this Court.

Indeed, where the highest state court considers and disposes of a federal issue, "it is irrelevant to inquire when a federal question was raised in a court below." *Orr v. Orr*, 440 U.S. 268, 274-275 (1979). "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436-437 (1959).

Although the California Supreme Court opinion does not expressly cite the Commerce Clause, it explicitly acknowledges the reality of interjurisdictional practice of law. App. 11. The court held that an out-of-state lawyer could violate Business and Professions Code section 6125 without even physically entering the State of California simply by advising a California client by telephone, fax, or computer. App. 10. The California Supreme Court recognized the "demands of business and the mobility of our society pose distinct problems in the regulation of the

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be free to select counsel of choice. Unless the venue of the dispute was a public tribunal, a party should not be forced to hire local counsel particularly when such party may have competent in-house counsel. Justice Chin and the majority of the California Supreme Court rejected petitioners' proposal.

practice of law." App. 11 (citing ABA Model Code of Professional Responsibility EC 3-9). Moreover, the court acknowledged "the need to accommodate the multi-state nature of law practice," but refused to apply the exception in this case. App. 21.

Clearly, multi-state law practice by definition constitutes interstate commerce. By expressly rejecting Petitioners' multi-state representation argument, the Court affirmatively decided whether or not Business and Professions Code section 6125 violated the Commerce Clause. The rejection of an argument based on impermissible barriers to interstate commerce, is unquestionably a rejection on the merits of the Commerce Clause issues presented in the Petition for Certiorari. It is inconceivable that the California Supreme Court's judgment was rendered without considering interstate commerce. The opinion demonstrates as much. Therefore, this Court may hear both questions presented.

Furthermore, even if this Court decides the interstate commerce issues were not sufficiently raised or passed on, it may still hear and decide them as this Court has treated the "so-called 'not pressed or passed upon below' rule as merely a prudential restriction." *Illinois v. Gates*, 462 U.S. 213, 219 (1983). In *Terminiello v. Chicago*, 337 U.S. 1 (1949) and *Vachon v. New Hampshire*, 414 U.S. 478 (1974), the Court reversed state criminal convictions on Constitutional grounds not urged in state court. In *Vachon*, this Court reaffirmed that it possessed discretion to ignore the failure to raise in state court the question on which it decided the case. *Vachon*, 414 U.S. at 479 n.3. "Though we do not normally decide issues not presented below, we are not precluded from doing so." *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

This Court also recognizes it often may be unclear whether the particular federal question presented in this Court was raised or passed upon below.

> [If] the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.

Illinois v. Gates, 462 U.S. 213, 220 (1983) (citing *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899)). In *Illinois v. Gates*, this Court stated that it will not attempt to "draw a clear-cut line between cases involving only an 'enlargement' of questions presented below and those involving entirely new questions." *Gates*, 462 U.S. at 220. In his concurring opinion in *Gates*, Justice White stated:

> We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below.

Gates, 462 U.S. at 248 (White, J., concurring). The Commerce Clause issues presented to this Court are not new questions, but are simply part of the multi-state practice of law and interstate commerce issues raised in the courts below. As set forth in the Petition and supporting amicus briefs, this case has great constitutional, legal and economic significance and should be reviewed by this Court.

B. This Court Has Jurisdiction As The California Supreme Court Considered And Ruled On The Federal Arbitration Act Issues.

There is no dispute that Petitioners' second question in the Petition for Writ of Certiorari was properly presented and passed on by the California Supreme Court. In its opinion, the court noted that "the FAA regulates arbitration that deals with maritime transactions and contracts involving the transportation of goods through interstate and foreign commerce," but disagreed with Petitioners' contention that it preempted California Business & Professions Code section 6125. App. 20. Because the California Supreme Court passed on this federal issue, this Court has jurisdiction of this case pursuant to 28 U.S.C. section 1257.

II. Petitioners Have Suffered Actual Injury And Have Standing To Assert These Claims.

Respondent claims that Petitioners lack standing. This assertion ignores the fact that Petitioners themselves have suffered actual injury from the final judgment of the California Supreme Court. The judgment precludes Petitioners from enforcing the fee agreement against Respondent for the legal services that they performed in California. App. 2-3. Petitioners meet all Article III standing requirements on their own and, as lawyers, may also challenge unconstitutional burdens to interstate commerce that injure their clients.

In order to establish the threshold actual case or controversy requirement imposed by Article III of the Constitution, "a litigant first must clearly demonstrate

that he has suffered an 'injury in fact.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). There is no doubt that Petitioners have suffered the requisite actual injury as they have been denied the right to collect certain fees. Thus, Petitioners have the requisite "personal stake in the outcome" that assures that "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Petitioners also satisfy the "causation" and "redressability" prongs under the Article III test as the loss of the right to recover their fees "can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38-41 (1976).

Petitioners, as attorneys, may also assert the rights of clients. *Department of Labor v. Triplett*, 494 U.S. 715, 720-21 (1990). This Court has allowed litigants to advance the constitutional rights of others when the litigant has suffered from some injury in fact to satisfy the Article III case or controversy requirement. *Caplin & Drysdale v. United States*, 491 U.S. 617, 624 n.3 (1989). As discussed above, Petitioners suffered actual injury from the California Supreme Court's judgment. Thus, Petitioners meet the first requirement for third-party standing.

A second, prudential inquiry generally looks at the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights, and the impact of the litigation on third-party interests. *Caplin & Drysdale v. United States*, 491 U.S. 617, 624 n.3 (1989). This Court, however, has held that an

obstacle to the rightholder's suit is not necessarily a prerequisite for third party standing. *Id.* In *Caplin & Drysdale*, this Court held that a lawyer had third-party standing to raise the Sixth Amendment rights of a client when challenging a statute that might have inhibited the client from paying attorney's fees. Id.[2]

This Court has recognized that the attorney-client relationship is "one of special consequence." *Id.* Contrary to Respondent's claim, an attorney can assert the rights of prospective clients.

> A restriction upon the fees a lawyer may charge that deprives the lawyer's **prospective client** of a due process right to obtain legal representation falls squarely with this [third party standing] principal.

Department of Labor v. Triplett, 494 U.S. 715, 720-21 (1990) (citing *Caplin & Drysdale v. United States*, 491 U.S. 617, 623 n.3 (1990)) (emphasis added). Moreover, this Court will grant third party standing in cases where:

> the enforcement of a restriction against a litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement).

Triplett, 494 U.S. at 720-21 (citing *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 954-958

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[2] The Court concluded that even though a criminal defendant suffers no serious obstacles to advancing his or her own claim, the other two factors weighed strongly enough for the lawyer to have standing. *Id.*

(1984)) (professional fundraiser given third-party standing to challenge statute limiting its commission to 25% as violation of clients' First Amendment right to hire him for a higher fee). Petitioners may properly assert their own rights and the rights of future clients because they are challenging a judgment that imposes unreasonable burdens on interstate commerce, a judgment that injures lawyers and clients alike.

CONCLUSION

This Court has jurisdiction over both questions presented for review and Petitioners have standing to assert their claims on their own behalf and on behalf of their clients. The petition for writ of certiorari should be granted.

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